SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No.

JOHN FACTOR, DESCRIBED IN THE EXTRADITION PROCEEDINGS AS HARRY WISE, ALIAS J. FACTOR, ALIAS GUEST, ALIAS J. WALKER, PETITIONER,

vs.

H. C. W. LAUBENHEIMER, UNITED STATES MARSHAL, AND GODFREY HAGGARD, HIS BRITANNIC MAJESTY'S CONSUL GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

VOL. II.

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[fol. 3]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT

4764

H. C. W. LAUBENHEIMER, etc., et al.

vs.

JOHN FACTOR, etc.

Appeal for the District Court of the United States for the Northern District of Illinois, Eastern Division

ORDER SETTING CAUSE—May 23, 1932

It is ordered by the court that this cause be, and the same is hereby set down for hearing on Wednesday, June 1, 1932.

[fol. 4] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—June 1, 1932

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Franklin R. Overmyer and Mr. John G. Drennan, counsel for appellant, and by Mr. Rush C. Butler, Mr. G. Gale Gilbert, Jr., and Mr. Allan J. Carter, counsel for appellee, and the court having heard the same takes this matter under advisement.

[fol. 5] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Title omitted]

NOTICE OF MOTION TO DISMISS—Filed Oct. 5, 1932

To Mr. Franklin R. Overmyer, Mr. Adelor J. Petit, Jr., 33 South Clark Street; Mr. John G. Drennan, 100 West Monroe Street, Chicago, Illinois:

Please take notice that on Wednesday, the 5th day of October, A. D. 1932, at the opening of court, or as soon thereafter as counsel may be heard, we shall appear before the United States Circuit Court of Appeals for the Seventh Circuit, in the courtroom usually occupied by them, or in such other room as they may be sitting, in the Federal Building, Chicago, Illinois, and then and there present a motion on behalf of John Factor, appellee herein, to dismiss the appeal in the above entitled cause.

At which time and place you may appear if you so see fit.

Rush C. Butler, Allan J. Carter, S. O. Levinson, G. Gale Gilbert, Jr., Don M. Peebles, Counsel for Appellee.

Received a copy of the above and foregoing Notice this 4th day of October, A. D. 1932.

Franklin R. Overmyer, Adelor J. Petit, Jr., John G. Drennan.

[File endorsement omitted.]

[fol. 6] [File endorsement omitted]

[fol. 7] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO DISMISS APPEAL—Filed Oct. 5, 1932

Now on this 5th day of October, A. D. 1932, comes John Factor, the appellee in the above entitled cause, by his attorneys, Butler, Pope, Ballard & Elting and Levinson,

Becker, Gilbert, Peebles & Swiren, and without prejudice to his position that the decision of the United States District Court in this cause should be affirmed, moves this Court to dismiss the appeal of H. C. W. Laubenheimer, United States Marshal for the Northern District of Illinois, Eastern Division, and Godfrey Haggard, His Brittannic Majesty's Consul General, and shows in support of said motion the following, to-wit:

1. That the treaty between Great Britain and the United States of America providing for the extradition from one country to the other of persons accused of the commission [fol. 8] of crime has been used in this case for the purpose of collection of private debts.

2. That the fact of the misuse of said treaty did not come to the attention of the appellee herein until a very recent date and that the appellee was unable to secure proof thereof until about September 22, 1932.

3. That Franklin R. Overmyer, the attorney for the appellant, Godfrey Haggard, His Britannic Majesty's Consul General, has been misusing the treaty in an effort to collect money for himself as attorney's fees in the civil case hereinafter mentioned, as well as to collect alleged private debts for various British subjects.

4. That the conduct of said attorney has been known and acquiesced in by the official consular and diplomatic representatives of the British Government.

5. That the processes of this Court and the United States District Court for the Northern District of Illinois have been abused by the British Government and its legal representatives and consular and diplomatic officers.

This Court should dismiss this appeal without further consideration thereof for the reasons above set forth.

Suggestions in Support of Motion

On May 12, 1931, the British Consul General in Chicago swore out a complaint seeking the extradition of the appellee before United States Commissioner Walker; on May 20, 1931, the appellee voluntarily appeared to answer the application for his extradition to Great Britain; on the

same date, May 20, 1931, a class suit was brought in the [fol. 9] United States District Court for the Northern District of Illinois, on behalf of Arthur Travis Faber and all those who might seek to join with him for the recovery from the appellee of alleged civil claims "in excess of $1,000,000," the plaintiff being represented of record in said cause by John H. S. Lee, an attorney at law located in Chicago, Illinois.

On or about May 22d or 23d, 1931, the said Franklin R. Overmyer, representing the British Consul General at Chicago in the extradition case, had a conference with the said Lee, representing the plaintiffs in the civil case, and an arrangement was made between the said Overmyer and the said Lee for mutual cooperation and for a division of any fees which should be received in the civil case; thereafter, from time to time, the said Overmyer and the said Lee did so cooperate in the prosecution of the said civil case, but said cooperation was kept secret from this appellee and said Overmyer denied any connection with the said civil case. It was known to the appellee, however, that said Overmyer claimed to represent the British Government Receiver generally, but said Receiver had not intervened in said civil cause. Said cooperation on behalf of said Overmyer included strenuous efforts at all times to incarcerate the appellee pending hearing of the extradition case.

In July, 1931, an amended bill was filed against appellee by the plaintiffs in the said civil case, and on behalf all other parties seeking to join therein, and said Lee went to London, England, and there conferred with the Government officials having in charge the liquidation of the companies mentioned in the extradition record; shortly before departing on said trip to Europe said Lee and said Over- [fol. 10] myer had a further discussion as to the division of fees and mutual cooperation in the said civil case, and then discussed a division of 60% of any fees in the civil case to Overmyer and 40% to Lee; Lee carried with him to London from said Overmyer, a letter of introduction to one Ralph Wordsworth, a London Solicitor, then representing said British Government Receiver; said Lee, while in London, England, on said trip, in company with said Wordsworth interviewed the Senior Official Receiver in Companies Liquidation, the British Government official having in charge the matter of the liquidation of the com-

panies mentioned in the extradition record, and said Wordsworth, did in Lee's presence secure from said Government Receiver permission to solicit all the purchasers of stock of the Vulcan and Rhodesia companies to join in said civil case. Said Overmyer claims a right to a division of fees in the civil case in part, because of his cooperation with said Lee in thus assisting in obtaining claims against this appellee. As a result of said solicitation all but two of 870 of the plaintiffs and interveners in the civil case represented by Lee were thus secured. Said civil case was carried on at the same time that the extradition case was being prosecuted by the said Overmyer before Commissioner Walker and before Judge Carpenter. At various stages in the course of the prosecution of the two suits the said Overmyer renewed his demand before Commissioner Walker that the appellee should be placed in jail, although the appellee was then in the custody of the Marshal and should have been enlarged on bail. The said Overmyer was not an attorney of record in the civil case. The said Overmyer, however, was present in the United States District [fol. 11] Court at many of the hearings in the civil case and one Thomas C. McConnell, an assistant to said Lee, was present at many hearings of the extradition case before Commissioner Walker, and the said Lee and McConnell were present in open court upon the presentation of this cause to Judge Carpenter.

The arrangement between the two said attorneys, Overmyer and Lee, was finally consummated by the execution of a written contract dated January 6, 1932, the original of which said contract was introduced in evidence in the civil case by Benjamin F. Langworthy, representing the said British Government Receiver on a contest over attorneys' fees in said civil case. In and by the said contract the said Overmyer promised and agreed to cooperate "in every possible way" with the said Lee in carrying the civil litigation to a successful conclusion "by settlement or otherwise". Said contract provides that of the fees to be received by Lee in the civil case he was to divide them on the basis of 30% to Overmyer.

Thereafter the civil litigation was compromised and settled by contract entered into on July 19, 1932. The said settlement provides for the complete discharge of the alleged liability of the appellee to all of the persons complaining

against appellee by the payment on his behalf of $1,300,000, as provided in said contract. All of the terms and provisions of said contract and the payments provided to be made by said appellee thereunder have been made and all alleged civil liability of the appellee has been completely discharged and released under the terms of the decree entered by the United States District Court for the North-
[fol. 12] ern District of Illinois, Eastern Division, on September 29, 1932. Said settlement agreement also provides that the United States District Court for the Northern District of Illinois, Eastern Division, fix and determine the amount of fees that should be awarded to the attorneys for the plaintiffs in the civil case. When the matter of the arrangement between the said Overmyer and the said Lee came to the attention of the United States District Court it reserved 30% of the sum which it held to be a reasonable amount for attorneys' fees, and entered an order permitting said Overmyer to appear within twenty days from the entry of said decree and show cause, if any, why he should receive same. During the course of the hearing, and before the entry of this decree, said Overmyer was present in the United States District Court and by counsel asserted rights to participate in said award of attorneys' fees but failed to become a party to the litigation, although given that opportunity by the United States District Court. The sum of $77,000.00 has been retained in the jurisdiction of the Court, which said sum the said Overmyer claims to belong to him as attorneys' fees for services rendered in the civil case.

It was also stated in open court before Judge Wilkerson of the United States District Court upon behalf of Overmyer that the British Consul General in Chicago knew of said arrangement, that the British Embassy in Washington knew of such arrangement, and it appears by the intervening petition of the Senior Official Receiver in Companies Liquidation of the United Kingdom of Great Britain filed in the civil case, that he was aware of this contract and this arrangement and cooperation as early as January 16, 1932, [fol. 13] which date preceded the decision of Judge Carpenter in this habeas corpus case, and preceded by a very substantial time the perfection of the appeal of this cause to this Court. The arrangement between Overmyer and Lee was kept secret from this appellee and from the various

United States District Courts through which this extradition case and the civil case have proceeded. Said Overmyer while admitting that he represented the British Receiver generally, nevertheless denied throughout the hearings before United States Commissioner Walker that he or the British Government had any connection whatsoever with the said civil case, and the said Overmyer said before the Honorable Judges of this court in chambers, on May 23, 1932, that he had absolutely no connection with the civil case or any relationship to or control over the said Lee in that matter.

All of the matters and things contained in these suggestions in support of this motion except the matters herein set forth occurring before Commissioner Walker and this honorable Court are susbtantiated and proven by the record and proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, in the case of Arthur Traviss Faber, et al. v. Foreman-State Trust and Savings Bank, et al., No. 10538. This improper use of the treaty and the process of this Court and of the United States District Court by the legal, consular and diplomatic representatives of the British Government is in violation of law.

For the reasons set forth herein appellee humbly prays that this appeal be forthwith dismissed as in violation of [fol. 14] said extradition treaty, as against public policy, and as an abuse of the processes of the United States Courts.

Rush C. Butler, Rush C. Butler, S. O. Levinson, S. O. Levinson, G. Gale Gilbert, Jr., G. Gale Gilbert, Jr., Allan J. Carter, Allan J. Carter, Don M. Peebles, Don M. Peebles, Counsel for John Factor, Appellee.

[fol. 15] State of Illinois,
County of Cook, ss:

Allan J. Carter, being first duly sworn, on oath deposes and says:

That he is one of the attorneys of record for the appellee, John Factor, in this cause; that he has read the foregoing motion, the reasons therefor and the suggestions in support thereof and that he verily believes that all of the matters and things therein contained are true.

That his belief as to the facts stated in said motion, the reasons therefor and the suggestions in support thereof are based upon the sworn testimony of John H. S. Lee and Thomas C. McConnell heard by him in open court and the exhibits offered in evidence in the case of Arthur Traviss Faber, et al. v. Foreman-State Trust and Savings Bank, et al., No. 10538, in the United States District Court for the Northern District of Illinois, Eastern Division, and from an examination of the printed and typewritten record of the extradition proceedings before United States Commissioner Walker, and upon occurrences taking place before the members of this Court and in affiant's presence in chambers on May 23, 1932.

Allan J. Carter, Allan J. Carter.

Subscribed and sworn to before me this 5th day of October, A. D. 1932. Varian M. Bates, Notary Public. (Seal of Varian M. Bates, Notary Public, Cook County, Ill.)

[fol. 16] In United States Circuit Court of Appeals

[Title omitted]

Minute Entry of Continuance—Oct. 5, 1932

Now this day come the parties by their counsel and counsel for appellee presents a motion to dismiss this appeal, and at the request of counsel for appellants the hearing of said motion is continued until Tuesday, October 11, 1932.

And afterwards, to-wit, on the eleventh day of October, 1932, there was filed in the office of the Clerk of this court a statement of evidence, case of Arthur Traviss Faber, et al. vs. Foreman State Trust and Savings Bank, a corporation, et al., No. 10538, in support of motion to dismiss appeal, which said statement of evidence is in the words and figures following, to-wit:

[fol. 17] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 10538

ARTHUR TRAVISS FABER and ADAH HAYHURST, Plaintiffs,

vs.

FOREMAN-STATE TRUST AND SAVINGS BANK, a Corporation; Foreman-State Corporation, a Corporation; First Union Trust and Savings Bank, a Corporation; Union Bank of Chicago, a Corporation; The Central Trust Company of Illinois, a Corporation; J. Factor, Louise Cohen, Rella Factor, née Cohen, and Arthur L. Schwartz, Defendants

Statement of Evidence

Filed by appellee in support of motion to dismiss appeal, cause No. 4764, H. C. W. Laubenheimer, United States Marshal, et al. vs. John Factor, etc.

Endorsed: Filed October 11, 1932. Frederick G. Campbell, Clerk.

[fol. 18] [Title omitted]

CAPTION

Be it remembered and certified that on the 21st day of September, A. D. 1932, being one of the days of the September Term A. D. 1932 of this court, the above entitled cause came on for hearing before the Honorable James H. Wilkerson, Judge of said court, upon the issues joined therein and upon the motion of John H. S. Lee for the allowance of solicitors' fees.

[fol. 19] APPEARANCES

Messrs. Levinson, Becker, Gilbert, Peebles & Swiren, by George Gale Gilbert, Jr., and Messrs. Butler, Pope, Ballard & Elting, by Rush C. Butler and Allan J. Carter, for defendants Arthur L. Schwartz, John Factor, and Rella Cohen Factor.

George Gale Gilbert, Jr., for defendants Leah Factor, Nathan Factor, Frank Factor, Dena Goldstein, Gussie Mavergan, William Cohen, and Anna Cohen.

Frederic A. Fischel, as guardian ad litem on behalf of Jerome Factor and Alvin Jay Factor, minors, and as statutory trustee for persons not yet in being.

Messrs. Burry, Johnstone, Peters & Dixon, by John W. Kearns, for defendants Foreman-State Trust and Savings Bank and First Union Trust and Savings Bank.

Messrs. Langworthy, Stevens, McKeag & McCornack, by Benjamin F. Langworthy, for George Digby Pepys, the senior official receiver in companies' liquidation.

Messrs. John H. S. Lee and Thomas C. McConnell, for all complainants and interveners.

John H. Healy, for John H. S. Lee.

Whereupon the parties respectively offered and intro-
[fol. 20] duced the following evidence and exhibits of evidence, and the following evidence was rejected and objections and motions were made and rulings of the court were entered, all as follows, to-wit:

[fol. 21] COLLOQUY

Mr. Healy: As I understand it, if your Honor please, this matter comes up on the presentation by the parties of a decree to which all of the counsel except those representing the bank defendants *except those representing the bank defendants* have subscribed and agreed; a draft of the decree has been submitted to all parties, and we are ready to submit it to your Honor for your Honor's inspection and decision.

Then, we would like to be heard on the question of the solicitor's fee.

The Court: Are you ready to proceed on it?

Mr. Healy: Yes, your Honor, we are ready now, if it is agreeable to the Court.

The Court: All parties ready?

[fol. 22] Mr. Langworthy: We are ready to proceed. We haven't any witnesses now but we are ready to proceed.

Mr. Gilbert: May I supplement Mr. Healy's statement by saying that at 2 o'clock this afternoon there will be presented to your Honor a counter-claim on behalf of the two trustees. The decree will then be presented, and by agreement of all parties we were to proceed as speedily as it met with your Honor's convenience with the hearing on the solicitor's fee.

The Court: I don't know why you should not proceed on the evidence on that subject this morning, I think you better use the morning.

Mr. Healy: Shall we proceed here or in the Court's chambers? I don't think it makes much difference, except the contract of the parties entered into in England provided that the matter should be heard by your Honor in chambers.

Mr. Langworthy: I think it reads, "With your Honor's permission"—it does not make any difference to me.

The Court: Well, I don't think it makes any difference.

Mr. Langworthy: It does not make any difference to me except I want to be guided by the Court's wishes, I want to accommodate the Court.

Mr. Healey: It makes no difference to Mr. Lee.

[fol. 23] The Court: I think the court room is a little more convenient, there is a little more air in here, and there is just as much publicity in the chambers as there is in court.

Mr. Healy: Mr. Lee is claiming a fee here based on a contingent basis for his representation of these plaintiffs and the interveners, and in bringing about a settlement in connection with this sum of money.

The Court: The contract is in writing?

Mr. Healy: Yes, your Honor.

The Court: And will probably speak for itself.

Mr. Healy: If you want to know generally what will develop in the hearing——

The Court (interposing): A certain percentage of the amount recovered?

Mr. Langworthy: The contract provides in paragraph 2, your Honor, that in the event of this agreement becoming final and fully operative, as provided in clause 10, hereof, the money provided to be paid, and the notes provided to be delivered by virtue of clause 1, hereof, should be paid out and distributed as follows:

The court costs of the plaintiffs and the interveners, it being provided in the plaintiffs' second amended bill of [fol. 24] complaint in said clause that all parties similarly situated may intervene in said suit, by paying their pro rata share of the expenses thereof, all out-of-pocket expenses of Mr. Lee and Mr. Wordsworth of the plaintiffs and interveners, and their other solicitors in England, including traveling expenses of the plaintiffs, their solicitors and attorneys, and the expenses of taking depositions, all as provided by the itemized signed statements of account to be presented to the United States District Court upon the entry of the decree hereinafter mentioned.

Mr. Butler: What are you reading from?

Mr. Langworthy: This is the contract of settlement.

Mr. Carter: He has one of the original copies, he is reading from paragraph 2, your Honor.

Mr. Langworthy: I am reading from paragraph 2, your Honor. I had read down to the end of the first sentence in paragraph No. 2:

"Any decree hereinafter mentioned shall provide for the payment hereinbefore described, the attorneys' fees of Mr. Lee shall, after hearing is first had thereon as hereinafter provided and admitted and allowed to the plaintiffs and [fol. 25] interveners in said cause pending in the United States District Court for the Northern District of Illinois, and shall be charged only against money and the securities mentioned in clause 1 hereof and shall be paid to Mr. Lee as follows: Three-thirteenths thereof in notes and ten-thirteenths thereof in cash; such attorney's fees to include, upon proper approval thereof, such legal services as have been rendered to Mr. Lee, and which Mr. Lee has obligated himself to pay. The provision herein that attorney's fees are to be allowed to the plaintiffs and interveners instead of to Mr. Lee direct shall not affect the right of any one to object to and be heard thereon by the Court as to the amount of said attorney's fees.

"The said decree of the Court hereinbefore and hereinafter mentioned shall contain the provision of this clause as to the payment of attorney's fees. The attorney's fees to be so fixed and determined by the Court shall be fixed upon the basis that the services have been rendered on a contingent fee basis, the hearing or hearings thereon shall

be held in chambers; depositions taken in said cause if offered or read, and any other evidence offered or consid-
[fol. 26] ered upon such hearing or hearings, shall, with the consent of the Court, be impounded, expressed and sealed up by the Court; expert witnesses, if any, shall be limited to three on each side unless otherwise ordered by the Court."

Then it provides some other things.

Now, it is my contention, your Honor, that under the facts and circumstances in this case that Mr. Lee's fees should not be fixed by the Court on the basis of a contingent fee, although it is so provided in this contract. His fee should be fixed and determined on the usual and customary fee basis, or, if there is such a thing, the reasonable compensation.

The Court: Well, practically, does it make any difference?

Mr. Langworthy: Perhaps it won't. I want to say this to your Honor, I am not here in a hostile attitude towards Mr. Lee. I want to say to your Honor that the senior official receiver for the British Government feels that Mr. Lee has rendered valuable services for which he should be paid a reasonable sum for his compensation, and he does not want me to attack that payment in any hostile manner, but he does want to have the same held down to a reasonable sum, or what would be reasonable compensation for the
[fol. 27] services for which it is agreed in this contract he is to be paid.

The Court: In England or America? I have had some experience with fees in England.

Mr. Langworthy: No, I take it that it applies to America.

Now, I have some law on the right for me to make this contention that I will present to the Court if it is questioned. I don't know that it will make any difference in the amount that your Honor would allow to him, but it seems to me——

The Court (interposing): Is there in this contract a provision for a certain per cent of the amount covered?

Mr. Healy: No, the contract is that Mr. Lee shall be given a reasonable fee for the services which he rendered,

and that that fee, that reasonable fee, shall be based upon a contingent basis.

The Court: That is to say, no recovery, no fee?

Mr. Healy: No recovery, no fee.

The Court: And you claim the fee to be fixed on the basis that he would have been entitled to recover against these clients, even if there were no recovery—is that it, [fol. 28] Mr. Langworthy, that the Court fix it on the basis of the ordinary relationship between attorney and client, that the attorney is entitled to have some fee regardless of the outcome of the litigation? Of course, he might be entitled to it in many aspects.

The attorney is always entitled to more if the result of the litigation is favorable, and that, as I understand it, is one of the elements the Court is bound to consider in fixing a fee.

Mr. Langworthy: I agree with your Honor.

The Court: The outcome of the litigation is one of the things to be taken into consideration on the question of fixing a fee, although the lawyer is entitled to something if the outcome of the litigation is not successful.

Is it your view that under these agreements, which I have not examined, that Mr. Lee would have been entitled to some fee even though there was no recovery?

Mr. Langworthy: That is not my contention.

Mr. Healy: If Mr. Lee did not succeed and did not prevail, he would have received nothing for the services which he rendered.

The Court: As I understand the point now, it is a state-[fol. 29] ment of principles which the Court is to *be* follow in fixing the fee.

Just how does the principle, as you contend, differ from the rule as stated in the contract?

Mr. Langworthy: I contend that in fixing the fee to be allowed that the Court can only, in this class of cases, allow the usual and customary fees paid for similar services in other litigations for the services for which the allowance is made.

The Court: I think that is true, but isn't it also true that one of the elements the Court must consider, not only in this but in any case, is the fact that the attorney had bound himself by agreement not to receive any fee unless there was a recovery?

Mr. Langworthy: No, I think that is not the law.

The Court: You think that should not be considered?

Mr. Langworthy: Yes. May I say this——

Mr. Healy (interposing): We disagree with Mr. Langworthy.

Mr. Langworthy: I appreciate that.

The Court: I am trying to get the precise point of difference between you.

Mr. Langworthy: I wish your Honor to consider this: [fol. 30] Anything that I might say I don't want you to take it that it is in a hostile way towards Mr. Lee's claim.

Now, as I understand it, when this document was made there was no longer any contingency in the matter. The amount that was to be recovered had been agreed upon, $1,300,000. It was no longer a contingent matter.

In the contract they provide, as I understand it, that the plaintiffs in this case are to be paid first all of their claim and all of their solicitors' fees and out-of-pocket money. They get 100 cents on the dollar. They are made whole. Now, the interveners, they are the same. I think Mr. Lee told me there were over 800 interveners and they employed Mr. Lee. It will appear from the evidence, your Honor, on this agreement here which I hold in my hand, in which it was agreed that Mr. Lee was to look for his remuneration for his services only to any funds which may be recovered in the proceeding, and that out of any funds to be recovered in such proceedings he has to be paid in respect of his remuneration the sum or sums which may be allowed by the Court to the plaintiffs in such proceedings as attorney's fee. The judge of the court may fix a reasonable fee for your services, taking into consideration the services were [fol. 31] rendered and the funds recovered.

Now, that was his contract to his clients, the interveners.

Mr. Healy: No plaintiffs?

Mr. Langworthy: No, this is not the contract to the plaintiffs. I don't know what his contract with the plaintiffs was yet. I think it will appear from the evidence.

Now, I think it will appear from the evidence that some months previous to the signing or entering into this contract it had been represented to Mr. Pepys, the senior official receiver of these companies, that the plaintiffs in this case, if successful, would have the right to have their attorneys' fees charged and fixed and paid out of the fund

recovered, and that it was customary in this country to allow 33⅓ per cent to 50 per cent of such recovery as attorneys' fees, and that, therefore, it was better for Mr. Pepys to accept settlement and be successful in the litigation; he being talked to as the party in interest, although he simply was there represented as the receiver of the company, and that Mr. Pepys had this in mind when the contract was drawn, and repeated it — Mr. Lee.

[fol. 32] Now, Mr. Lee did not tell him that that was not the law, and in that respect he misled him. I don't mean by that statement that he intentionally misled him. I assume he was ignorant of the law on the subject and perhaps I am ignorant of the law on the subject, but I don't think so. I think it is settled in this country in this class of cases.

Now, your Honor should know that there are some 2,500 persons who are interested in this fund. Mr. Lee represented, I think it was three, as plaintiffs, or two.

Mr. Lee: Two originally, and later about a thousand, holding, as we believe, the majority of the amount of the claims. Possibly I am in error about that.

Mr. Langworthy: There were between two and three thousand, at least, of persons who are interested in this fund. Mr. Lee originally represented two, and then by virtue of this contract he became the attorney for some thousands, he says, as intervening petitioners.

Now, it was his duty when he made this contract with Mr. Pepys for his compensation to disclose to Mr. Pepys [fol. 33] the rights of these people he represented, that is, they had a right to have the fee taxed on a basis of a reasonable value of those services, that is, the other 11,000 had a right to have it taxed on that basis, and the other one or more, and the 1,000, of course, would probably be bound by this agreement.

I have the authorities and I think you ought to have in mind that question so that in ruling on the evidence——

The Court (interposing): That is to say if there had been a recovery in the case the plaintiffs or the interveners would have been entitled to amounts out of the fund which was created as a result of their efforts—compensation for their services—the Court could have done that if there was a recovery, they could have come before the Court and asked for an amount to be paid out of the fund which had

been created as a result of their efforts. There is no doubt about that.

Mr. Langworthy: No. But, in fixing that amount the Court would not be found to follow the contract between Mr. Lee and the parties he actually represented.

[fol. 34] The Court: The fact the Court might have done that would not affect in any way the rights of the parties themselves to make an agreement about the fee.

Mr. Langworthy: No.

The Court: I say, they could have done that?

Mr. Langworthy: That is true.

The Court: But you say he should have disclosed to his clients——

Mr. Langworthy: Yes.

The Court: —the rule of law?

Mr. Langworthy: Yes.

The Court: —that in an equity suit of this kind in United States Courts a fee may be ordered pay- to counsel for the complainant, paid to counsel for the plaintiffs, out of the fund created. Is that it, he should have told him that?

Mr. Langworthy: No, he knew that, but he should have told him the fee could not be allowed on a contingent fee basis, but on the value of the services.

Mr. Healy: When this contract was made, if your Honor please, this official liquidator who is now represented before your Honor by Mr. Langworthy was not Mr. Lee's client, and at the time the contract was made and the ar-[fol. 35] rangement entered into, Mr. Pepys, the official liquidator, was represented by his own independent counsel.

Mr. Langworthy: That is right.

Mr. Healy: And made this contract which provides in substance that the fee to be established in this Court should be established upon a contingent basis, and our position is, if your Honor please, that Mr. Langworthy's client, having entered into this contract, after being duly and properly advised with reference to the facts and circumstances and the law is bound by the contract and may not question the basis upon which the fee is to be established.

The Court: That is the liquidator?

Mr. Healy: He is the liquidator, if your Honor please, and the facts will develop he has advised all the real parties in interest that the fee in this case would be on a contingent or percentage basis, indicating, as I remember the record in that respect, that the fee would be 20 per cent or more of the amount recovered, and this contract which I say be entered into with the assent of the real parties in interest provided that the establishment of the fee shall be upon that basis and upon no other.

[fol. 36] The Court: That presents a question of law.

Mr. Healy: I may say in answer to Mr. Langworthy's question, that Mr. Lee represents now and has for a considerable time, represented 70 per cent of the amount of the persons who are interested in the fund and numerically something in excess of 50 per cent of those persons, and this arrangement has not only been assented to by the official liquidator represented by Mr. Langworthy, but it has been assented to by 99½ per cent of the clients represented by Mr. Lee in this proceeding, and by 98 per cent of all the parties. The other half per cent of those parties represented by Mr. Lee I believe we have not yet been able to get in touch with, and 2 per cent of the parties who are the only persons interested in the fund have not been reached, but 99½ per cent of Mr. Lee's clients have assented to it, and 98 per cent of the persons in interest in the fund assented to it, and their intervening here, the original plaintiffs and interveners, have all agreed that it shall be upon a contingent fee basis. It will develop, if your Honor please, in the hearing and presentation of the proof that Mr. Lee is not claiming and will not claim, probably, the maximum contingent fee to which he might be [fol. 37] entitled under the custom and under the law in this jurisdiction, but a somewhat lesser amount.

The Court: In any case of this kind where the attorney must look to the fund created as a result of his effort for his compensation, whether the attorney is—that fee in its nature is essentially contingent.

Mr. Langworthy: Yes, your Honor. That is explained very well by the Iowa Supreme Court.

I should have called your Honor's attention to the fact that in the letter that was sent out by the senior official receiver after this contract had been signed, he makes this statement, so as to be accurate about it, he notifies the

parties to whom these letters are sent what amount is to be paid. Then he notifies them that the plaintiffs in the case will be paid in full, their payment to them is 5,725 pounds.

Mr. Healy: The two original plaintiffs get their claim in full. The others pro rate.

The Court: I suppose they did that because they incurred some special liability in the case; they had to give bond for costs?

Mr. Langworthy: No.

Mr. Lee: They gave bond for costs, but it was a small [fol. 38] amount, but the language of Mr. Pepys was that they had conserved the fund here.

Mr. Langworthy: This remuneration is entirely within the discretion of the Court. It will probably be fixed on a percentage basis, and Mr. Lee informs me that he will ask for an allowance of 20 per cent or more of the above-mentioned sum, or approximately 360,000 pounds. That is what they were notified. This is the letter that went to them.

The Court: Did they consent to that?

Mr. Langworthy: They did.

Mr. Healy: As I suggested, 99½ per cent.

Mr. Langworthy: But they were not informed that under our law Mr. Lee was not entitled to be paid on a percentage basis. That is the point I am making.

Mr. Healy: He is entitled to be paid on a percentage basis.

Mr. Langworthy: And the point I make is, it was Mr. Lee's duty, although he did not know it, to inform Mr. Pepys of that.

Mr. Healy: As the Court suggested in the very nature of the case the contingent element must be taken into consideration, because where litigation of this sort is undertaken by counsel he agrees to give his services without [fol. 39] remuneration unless he is successful. That, of itself, impliedly, if your Honor please, if not actually, establishes a contract upon which the fee must necessarily be fixed on a contingent fee basis, and I think we will be able to satisfy your Honor that is the law in this jurisdiction and that is the arrangement and agreement between the parties.

The Court: The question of law you may argue after the evidence.

Mr. Lee: In view of the statement of counsel, Mr. Langworthy, saying that I failed to state something to the liquidator I want to say that he never has made the statement until now that I have kept anything from the liquidator. I think in view of his statement I ought to have the opportunity on the stand of explaining that I think he is entirely in error in regard to the law and there is no question about it, and I think the Court will so find.

Mr. Gilbert, Mr. Carter and I were very fair in every matter, so far as I know, with the liquidator, and I think Mr. Carter and Mr. Gilbert will admit that is so.

Mr. Langworthy made a statement that might lead the Court to infer that I kept something from the liquidator. [fol. 40] We were as fair as we could be with the liquidator, and gave him all the facts. If not, I hope that he will develop it while I am on the stand.

Mr. Gilbert: By leave of Court I want to make a short statement, and then the evidence can proceed.

I want to do this for the record, if the Court will permit me to do so.

The Court: You may proceed.

Mr. Gilbert: This settlement under which the decree will be presented this afternoon for your Honor's consideration came after a long series of very, very difficult negotiations, as you probably can appreciate. I think a moment to give your Honor the background of this contest is probably worth while.

After many difficult situations had been overcome and we reached an agreement as to the amount there remained the question of attorneys' fees. At the time that the attorneys' fees first came up, and this will explain some of this other conversation, Mr. Lee took the position that we should agree, because he had a contract with those interveners whom he represented, and which we were all under the impression at that time was about 50 per cent of the total claimants, he took the position that under the settle- [fol. 41] ment there should be an agreement as to the amount he should be awarded attorney's fees.

My client took the position that the percentage requested by Mr. Lee was excessive. And, so, out of that conflict, because my client had this in his mind, and I so stated to

everyone, that he was interested, that he was going to make a settlement having the highest amount of money possible going to the persons who were complaining against him, and he took the position that the attorney should not have the percentage they requested, and he would not settle if that was one of the conditions. So, out of that grew this agreement that it should be determined by the Court.

Now, I am stating this for the purpose of keeping my faith with the British authorities. I told them when we entered into this contract that I would upon behalf of Mr. Factor resist the application by the attorneys for the award that they were then requesting. The contract, under the British system—I mean the contract entered into by the official liquidator must be approved by the Court, and they went to an assistant, what would correspond to an assistant judge in this country, he is some sort of quasi-judicial officer who acts for the judge, and that individual—this was [fol. 42] after Mr. Lee and Mr. Carter had started back to the country—that individual refused to approve the settlement because of the letter which was called to your Honor's attention a moment ago providing that Mr. Lee was going to ask for 20 per cent. The contract had attached to it that letter. An appeal was taken from that person to the justice himself, Mr. Justice Gregory of the High Court of Justice, and after some hearings had in his chambers I was called in and he asked me then if I was going to resist an award of that percentage to Mr. Lee. I told him that was my client's instructions and I intended to do so. After that they employed Mr. Langworthy to represent them, that is, the official receiver as the representative of the persons entitled to distribution, and Mr. Langworthy has requested me to allow him the witnesses that I had sought to reserve for my client, and I have done so. I have done so at the request of the British authorities, and I want the record to speak perfectly plainly on that subject, because the settlement was approved by the High Court of Justice on the representation that the award there requested in that letter would be resisted.

I don't want it understood that I am breaking my word to the Court that I would resist it. I would like to have [fol. 43] the privilege of cross-examining the witnesses, and on the request of their own attorney I am surrendering the right to call witnesses in the situation.

Mr. Lee: Mr. Healy is not informed about the situation abroad, and counsel is in error about one thing. When this matter came up before what would be, as I understand it, equal to a Master in Chancery, or something of that kind, the Master said, "Yes, he is entitled to a reasonable fee, and we want to fix it" and my agreement with my clients was that the United States District Court here should fix it. I could not, in view of that contract, agree that anybody else should fix it without the consent of my clients—I said "No, I won't agree to that, I cannot agree to it." Then the Master went to the upper court and the court said, I understand the court said, I have rendered very valuable services and the contract ought to be approved with that condition, and that was done.

Mr. Gilbert: That is a correct statement. I took the position also that the Court here should fix the fee because we had contracted to do it, and we intended to stand by it.

Mr. Lee: I said it was entirely proper for the liquidator [fol. 44] to be represented and be concerned in my fees and asked the liquidator to do so; if your Honor remembers when Mr. Langworthy came in the order was entered on my express consent that he should do it.

Mr. Gilbert: The statement of Mr. Lee is correct except that the Court stated that the contract should be approved—otherwise, the statement is correct. The order will speak for itself. But, in the same order it is stated that the official liquidator should be represented upon this hearing. Otherwise, the statement is correct.

That is correct, isn't it, Mr. Lee?

Mr. Lee: Yes.

The Court: Proceed.

[fol. 45] JOHN H. S. LEE, called as a witness in his own behalf, being first duly sworn, was examined in chief by Mr. Healy and testified as follows:

Q. Will you please state your full name?
A. John H. S. Lee.
Q. Where do you reside?
A. 1225 Sheridan Road, Evanston.
Q. Cook County, Illinois?
A. Cook County, Illinois.

Q. How long have you been a resident of Cook County, Illinois?

A. Oh, for almost 40 years.

Q. And your age is what?

A. Sixty.

Q. You are a practicing attorney at the bar?

A. I am.

Q. And when were you admitted to practice your profession?

A. In 1898.

Q. Have you been continuously engaged in the practice of your profession since that time?

A. I have.

Q. Where?

[fol. 46] A. Here in Chicago, handling, of course, litigations in different parts of the country from Chicago.

Q. But your office has always been in Chicago?

A. In the City of Chicago.

Q. Will you state generally what your education was?

A. Well, I graduated from Harvard College in 1896. I went to Northwestern University Law School and graduated from the Law School. Do you want me to state about what happened along in there?

Q. Yes.

A. I was a professor of law, equity and trusts and criminal law at Northwestern University until my court duties rendered it impossible for me to continue in that.

I was a member of the staff of Senator Deneen, then States Attorney, for a couple of years. Later, I was a member of the firm of Musgrave, Oppenheim & Lee. Harrison Musgrave was the senior member of the firm, and am now associated with Senator Deneen and yourself in the practice of law.

Q. Your association with Senator Deneen and myself is an office arrangement, but not a firm arrangement?

A. That is true.

Q. You practice law independently of those with whom your name is associated?

[fol. 47] A. That is true.

Q. And during your practice at the Illinois bar as in the Federal Courts, what generally has been the character of the litigation which you have handled?

A. Well, the last 20 years I have been in contested chancery matters almost continuously. The fact is, I remember only one large matter on the law side of the court that I have handled during that time.

I have handled a large amount of important litigation in chancery matters involving millions of dollars. I have been quite universally successful. I don't mean by that to indicate that I have superior intelligence, but I have carefully investigated, usually, the cases before going into them. Anyhow, that has been the result.

Q. Have you represented litigants in many or few of such chancery matters?

A. Oh, I have represented litigants in many of such chancery matters and frequently involving, lately most of the cases I am in have involved large sums of money.

Q. By large sums of money, what do you mean?

A. By large sums of money I mean a half million dollars or more.

Q. Was Mr. Thomas C. McConnell associated with you in any way in this litigation which you are seeking to recover [fol. 48] a fee for legal services which you have rendered?

A. Yes, sir; he was and has been associated with me for some time.

Q. And in conjunction with your services in this matter has he also rendered services?

A. He has been rendering services, he and I have worked about the same time on this case since we have been handling it.

Q. How long has Mr. McConnell been associated with you?

A. Several years.

Q. Do you know about his legal and scholastic educations?

A. I looked up Mr. McConnell before he became associated with me. He is a graduate of Harvard College, a graduate of Harvard Law School. He has had quite a large amount of chancery practice and I soon found that he was experienced, alert, and has been a very valuable assistant to me.

Q. Has he been in this litigation in which we are now making this inquiry since the outset, since its inception?

A. Since the outset he has been in it.

[fol. 49] Q. When was the original bill filed in this case?

A. In May, 1920.

Q. 1920?

A. 1921—1931, I beg your pardon.

Q. May 20, 1931?

A. Around that time.

Q. Was that about the time you were obtained to represent the original plaintiffs in the action?

A. Yes, sir.

Q. How many plaintiffs did you represent at that time?

A. First, the Reverend Mr. Faber and Mrs. Faber. Later Mrs. Ada Hayhurst, and later the intervening petitioners and quite a large number of persons who sent their names over, but we did not want to join them as intervening petitioners, because we wanted to get the whole body in in a second group and not come in step by step.

Q. Eventually, how many parties did you represent as plaintiffs in the action?

A. I have not counted them, but I should say there are around a thousand. Possibly I am in error on that. Mr. McConnell may have counted them.

Q. How do their claims run with reference to amounts against the fund which is in controversy in this litigation?

A. Mr. McConnell figured it out at my request; about 70 per cent of the whole, as I am informed. I did not figure it myself.

[fol. 50] Q. Do those claims all have—are the claims in the same amount, or in dissimilar amounts?

A. They are dissimilar amounts. A great many of these claimants have very small claims.

Q. Aggregating about how much?

A. Oh——

Q. State a minimum and maximum amount of claims?

A. Oh, they run from $25 up to—one or two of them were around $40,000. I could get the exact amount by examining the records, but I haven't it in my mind.

Q. Well, the claims, as I understand it, run all the way from a few dollars to the large amount which you have just indicated?

A. Forty thousand dollars or fifty thousand dollars are a few of the larger.

Q. How many claims all told were either represented in this proceeding or in the British proceedings in London?

A. I have not counted them up.

Q. Yes.

A. But I think we represented 50 per cent of the claims in number.

Q. In number?

A. In number, but I may be in error. I have not counted them.

Q. The other 50 per cent in number are represented by [fol. 51] the British liquidator?

A. Yes, sir.

Q. What is his name?

A. Mr. Pepys.

Q. What is his first name?

A. George Digby Pepys.

Q. What was the aggregate amount of the claims which your clients and the other parties who you say are now represented by the British liquidator, what was the aggregate amount of all their claims against the fund?

A. Over 4 million dollars.

Q. Now, after you filed the original bill of complaint in this cause, as you say, in May, 1931, what did you do in connection with the matter?

A. Well, the first thing I did was to—we filed the original bill, the first thing I did was to go around to the British consul here.

Q. Just a minute, before you come to that. When you state the aggregate amount of claims to be around 4 million dollars, do you take into consideration the difference in the exchange between the money in this country and in Great Britain?

A. I said over 4 million dollars. I can get you that exact amount again by going to the records. It is probably down [fol. 52] here in the depositions.

Q. Well, in that same connection, do you know, Mr. Lee, if the settlement arrangement which was made in England, how much it will realize to these different claimants in amount?

A. Mr. Pepys figured that out. I did not figure it out. His letter shows it, that we have here to introduce in evidence.

Q. About 25 per cent?

A. That is right, about 25 per cent. I did not figure it. He did. That is, he figured 25 per cent after, as I under-

stand it, the solicitors' fees and whatever pocket expenses had been taken out.

Q. Now, if you will go right on and tell the Court what you did after you filed the bill.

A. Well, the first thing I did was to go around and see the British consul here. I told him that I had filed a bill on behalf of the Rev. Mr. Faber, and I said that after such investigation of the law as I had been able to make I decided that the remedy was a remedy on behalf of Mr. Faber and all others similarly situated; I said, "They are all British subjects, residents of Great Britain." I said, "You are interested in that, aren't you?" I said, "I wanted to get all the facts that I could from every source," and [fol. 53] he said we are interested in extradition proceedings, we are interested in getting Mr. Factor back to England. "Well," I said, "the fact that the British subjects want to get their money back does not seem to me is inconsistent with your desire to get Mr. Factor back to England." "Well," he says, "that is my position."

I asked him if he could give me the facts. He said, "No," that Mr. Franklin Overmyer represented him and if I wanted to I could go around and have a talk with him.

I then next went to the commissioner, Mr. Walker. I asked him if I might, if there would be any objection to my having a stenographer present at the hearing on the extradition proceedings. I said, "I would like to get all the facts that are introduced here as they are introduced."

He said, "I cannot keep anybody out. If there is any room here in the room, with a chair, I guess you have that right."

So that I arranged tentatively to have a stenographer present so I would know what the facts were.

Then I saw Mr. Overmyer. I went to see him. I saw Mr. Petit, Judge Petit, and Mr. Overmyer, and I told him I had been to the consul, Mr. Haggard, told him of my talk with [fol. 54] Mr. Haggard and told him Mr. Haggard had said I might speak with Mr. Overmyer. I told him I had made arrangements to have the testimony there at the hearings, to have a court reporter present.

Mr. Overmyer said, "I don't think that will be necessary." He said, "I have the copies of statements and affidavits."

I said, "Well, I would like very much if I could get those, it would save me expense and work."

And he said that he thought that he would let me take those. I don't know that he agreed to that at that time, but within several days—I don't know but what he did agree at that time to let me have copies of those.

I told him again that I did not understand how my action in representing the British subjects would prejudice the extradition proceedings. Well, he said that he was representing the official liquidator. He said, as a matter of fact, the official liquidator had been considering instituting a suit here and of bringing an action here along the same lines.

"Well," I said, "why don't you consider intervening in this suit that I brought?" I said, "I would like assistance from any direction that I can get it, and I would be glad to have you intervene. I would like to have your co-opera-
[fol. 55] tion," I said.

Then, during that time, we talked with Judge Petit. Judge Petit said, "Well, what arrangements could we make?" "Well," I said, "any reasonable arrangement, if you will take your share of the burden of this thing and do your part I will make a reasonable arrangement. I certainly need assistance here."

And that is where we left it at that interview, to my best recollection.

Mr. Overmyer furnished me—I had several conferences, then, with Mr. Overmyer, I think two or three, and I think with Judge Petit—anyhow, with Mr. Overmyer. I am not sure about Judge Petit. Mr. Overmyer furnished me a lot of statements and affidavits, but there was no index to them, and I said, "What about this, what is the situation here, as you analyze the situation?" Well, he did not tell me. I don't know whether he had not fully analyzed all the facts, or whether he did not care to go into the matter with me, but we got those statements, and we spent a number of weeks analyzing all those statements and affidavits and what not.

As the result of that I came to the conclusion that the general plan was a broader plan than I had thought.

And after we had gone into that, gone into other evi-
[fol. 56] dence that we got, were able to get, I prepared an amended bill, a second amended bill.

By the way, Mr. Factor had not been here when we filed the original bill, that is, I could not find where he was, anyhow. But, the next day after the bill was filed he had come into court and we filed an amendment making Mr. Factor and his wife party defendants.

Q. Who were the other defendants?

A. The other defendants were the banks here, who, as we were informed, held the funds which Mr. Factor had deposited or caused to be deposited in the banks.

Q. What banks were made parties defendant?

A. The Foreman State Trust & Savings Bank, Foreman-State Corporation, First Union Trust & Savings Bank, Union Bank of Chicago, Central Trust Company of Illinois. Later we dismissed the Central Trust Company of Illinois out of the case. They said they had none of these funds and asked if we would consent to dismiss them out of the case, and on their statement that they had none of the funds, we consented.

Q. How much money did you find in the possession of these banks, which you claimed belonged to Mr. Factor, and against which you were asserting a claim on behalf of the [fol. 57] plaintiffs in the action?

A. We did not find what was in their hands for a long time. We were informed that there was over 2 million dollars in the banks which had come from the Broad Street Press, but we did not—but before we had the answers of the banks on file stating that fact, we had gone through a year of litigation, here, practically.

Q. Well, now, go on and follow up your statement of services after that.

A. Where was I?

Q. You have come to a time when you had investigated the statements and affidavits furnished you by Mr. Overmyer and filed the second amended bill.

A. We filed the second amended bill, which set out in very considerable detail the plan that was shown, as we conceived, by all the information that we had gotten, and I verified that bill.

Q. How voluminous a document was that?

A. It is a printed document of 45 pages. I told Mr. Overmyer that the facts were so complicated that I would—I decided to go to England and take this matter up with my clients and with anyone else that I could get in touch

with that would throw light on the situation. I told him I was also going to kill two birds with one stone, I was going to take my family along, and I was going to take [fol. 58] a trip over there with that idea.

Q. When did you go abroad?

A. I think I sailed a day or two after we filed the amended bill, about July 18, and arrived there about 7 days later.

Q. July 18, 1931?

A. That is right.

Q. How long did you remain abroad?

A. Well, I was in London about 14 days at first. I went to see Tamplin & Company who were the local solicitors for Mr. Faber. I saw Mr. Darling and conferred with him, a solicitor that lived up north where Mr. Faber lived. I had a couple of conferences with Mr. Lord, who was a parish-oner of Mr. Faber's, who was interested in Mr. Faber.

I went out to Mr. and Mrs. Faber's home at Huvworth-on-Tees, and I there went over the situation with Mr. Faber and Mrs. Faber.

Q. While you were abroad on that occasion, how much time did you devote to this matter?

A. May I state this just a little further?

Q. Yes.

A. I also—Mr. Overmyer had stated to me that the solicitors there that were representing the liquidator was [fol. 59] Mr. Wordsworth of a well known firm there. He said he would like to give me a letter of introduction to Mr. Wordsworth and have me talk over the question of what I had done, and hand to Mr. Wordsworth a copy of the intervening petition that he had prepared. The letter said that Mr. Pepys was at liberty to intervene or start separate proceedings, and asked me to go into the matter with Mr. Wordsworth.

I went to see Mr. Wordsworth and he said he would like to see a copy of the second amended bill. I gave him a copy. He said he would like to take it home with him and he would like to have me come around the next day. I did and he was courteous enough to say that he thought that was the clearest and most lucid analysis of the situation that had come to his notice.

He said he had been in the proceedings more or less from the beginning, and that Miss Orum——

Mr. Gilbert: Miss Orion.

The Witness (continuing): —that he had filed a bill for Miss Orion; that he had rather started the proceedings over there. They said they had been rather close to it, but he said he had not seen an analysis of the situation until that day.

He said he had taken the liberty of showing the amended [fol. 60] bill to Mr. Pepys. He said Mr. Pepys wanted very much to see me—I may be wrong, he may have said he would like to see me. I don't purport to give the exact words as I am going along——

Q. Just give the substance of it, that is all we want.

A. I said I would be glad to see Mr. Pepys. We went down to see Mr. Pepys, and two other gentlemen were there, a Mr. Newman and someone else, I have forgotten the name of the other man. Mr. Pepys said that the bill was a very excellent one, and he said he had been thinking about taking action over here.

He said he was concerned about the question of costs. He said he had very little money. He said, "What about costs over in America? I don't want to get into a position where they would hold me for costs if I was not successful."

I said, "What do you mean by 'costs'?" "Oh," he said, "solicitors' fees and expenses of the other parties and everything of that kind." I said, "We have a little different practice over with us. When we refer to costs we are referring to court costs, and usually solicitors' fees are not included." He said, "That is entirely different here." I said, "You might be liable for some costs, but I don't [fol. 61] think it would be very material."

Mr. Overmyer had given me a brief on the question of clean hands. I gave some thought to the authorities on the question as to whether or not Mr. Pepys, representing the Broad Street Press when the Broad Street Press had been, as we claimed, the instrumentality through which Mr. Factor had operated, and the stock of which he owned, and which was under his control, as we were informed, whether it could come into a court of equity and Mr. Overmyer took the position that it could and he had the authorities that supported his position.

Well, we talked that over at some length.

I said I would be glad to have him intervene. I said I hoped he could do so. "Well," he said, "I will consider

the matter. I would like to see you again." Then we had another talk.

Mr. Pepys said he had been thinking over the matter. He said, "I don't say that I won't take action or intervene, but your suit apparently is holding the funds," and he said, "I think I won't intervene now." He said, "I think that these individuals," he said, "I kind of represent them in a way, and in a way I don't. I should think they might very well want to intervene."

He said to Mr. Wordsworth, "I don't see why you could not get in touch with them and find out whether they would [fol. 62] like to intervene." Mr. Wordsworth, I think, I don't know whether it was while we were at Mr. Pepys' office—probably when we had gone back to his office, we went back there—said that many of these people had no funds left. He said they could probably pay their share of the expenses, as you define court costs, but they could not pay you any fee, could you handle that on a basis that if you succeed you get a fee commensurate with what you have done, and if you don't succeed you get nothing?

"Well," I said, "I will ask you something: I have got to have someone here in England to assist me." I said, "I have had a talk with Mr. Overmyer about possible co-operation and compensation." I said I had tried a case in England a little while before and I had come to the conclusion that any man that tried to take depositions in England and to get evidence there, unless he had a local solicitor was just, it was just too bad; that their point of view, their way of doing things, everything of that kind was different from ours.

I said, they kind of think we are aliens, anyhow—I am not speaking of the educated Englishman, I am speaking about the ordinary Englishman. I said I will have to have co-operation of a good firm of solicitors.

[fol. 63] Now, I said, Tamplin & Company know a good deal about Mr. Faber's end of this case, but they don't know anything about this proposition after that time—the Broad Street Press—Tamplin & Company had said they did not know anything about it. I said that I did not think that, that I thought it would be very difficult to win the case unless I could have co-operation there. He told me it would be practically impossible for these people to come and testify, that their depositions would have to be taken.

I said, "You would practically have to try your case here, then." He said he thought that would be so. He said the records are all there, and you would have difficulty in getting the records out of this country.

I said, "Will you make some arrangements with me so you will go in with me on this proposition, you and Mr. Overmyer, and make your fee dependent on whether we are successful." Well, he said that he would.

He asked me what I would suggest. Well, he said—I think that he referred to a forwarding fee in an ordinary case and asked me about that. I said that an ordinary forwarding fee was probably about 33⅓ per cent, that is, where attorneys forward matters to other attorneys to handle.

[fol. 64] I said, "This is not that situation. You will have to do a lot of the work with me here. You have said yourself we have to take our depositions here, I will agree to this, if it is satisfactory to you, I will agree to take for my services 50 per cent of anything that the—" Well, he had asked me about what fee I would charge, a contingent fee.

"Well," I said, "I cannot tell." I said, "Here is a case that is a very involved case, and we might settle this possibly very soon, and we might have to contest this for a year or more. It is pretty difficult to tell, I cannot tell what we are going to get into."

He said, "What do you think, or what do you suggest?" I said, "Let us let the United States District Court fix the fee, he will know what we have done, what we are able to accomplish, if we are successful; let him go into it and fix it."

He said, "That is an admirable suggestion, I think that is very fair." He said, "What would you suggest about the division of the fee?" I said, "I will take 50 per cent and you and Mr. Overmyer can divide up the other 50 per cent." I said he hopes to get through with the extradition proceedings, in which case he could assist over there and you could be very valuable to me here.

He said, "I think that is fair." We made no agreement. [fol. 65] I said that would be satisfactory to me.

You asked me how much time I spent. I had a little book in which I kept the time.

Q. That is on the occasion of your first visit?

A. That is true. I have lost the book, but I can say this, I certainly spent—I cannot tell you in hours, but 10 days there in various conferences, in the various conferences. It takes longer in England to do business than it does over here, and I would say it certainly covered that time.

Q. We will come to the time element a little later. You have summarized that whole question of time?

A. You asked me, as I remember, that question.

Q. What else did you do, if anything, on the occasion of your first trip to England?

A. I went on this trip, we went up through Scotland and Wales, motored and came back to London. I saw Mr. Wordsworth again, but I am not sure that I did not see Mr. Pepys. Then we went over to the Continent and I traveled through France, Switzerland and got down to Italy. When I got down to Italy I got a cable from Mr. McConnell that a man by the name of Hawkins was offering compensation for claims against Mr. Factor for the purpose of filing a petition in bankruptcy against the [fol. 66] Broad Street Press.

Mr. McConnel said that we ought to have a receiver appointed, or apply for a receiver so that the question of a jurisdiction of the court over the funds would not be open to question. I cabled to Wordsworth. Wordsworth cabled back and said, "Yes, that was the fact that Hawkins had seen him"—no, pardon me, that Hawkins had not, but a man over there who was the agent of Hawkins had seen him and wanted to get the claims.

I wired to Mr. McConnell then authorizing him to apply for a receiver and I sent a copy of that wire to Mr. Wordsworth to keep him informed. He suggested that I better come back by London. So, I left my family in southern France and went by train to Paris and went across and sailed from London while they sailed from Cherbourg.

And then he showed me what he had written, a letter of which I have—yes, he wrote a letter out to the various claimants, and he had been getting a large number of replies.

Q. And he did that, as I understand your testimony, at the request of Mr. Pepys?

A. He did it at the suggestion of Mr. Pepys.

Q. All right, go ahead.

[fol. 67] A. Then I sailed for home. Mr. McConnell will have to tell you what happened in our absence, but the Monday I got home Mr. McConnell informed me that counsel for Mr. Factor had tried to have a motion set to dismiss the bill in my absence, that it was vacation and that his Honor, Judge Wilkerson, had, commenting upon that fact, had asked where I was and Mr. McConnell said that I was on the ocean. Judge Wilkerson asked when I would be back and Mr. McConnell had told him that I was getting here soon and Judge Wilkerson then asked everyone when this motion could be disposed of, that they had the right to make a motion to dismiss under the rules of the Federal Court, and Mr. McConnell said I would be here before the first of October and Judge Wilkerson then said he would put that motion to dismiss on that day, and unless everyone was ready to go to trial on that day, if anyone was unable to go to trial that day, he should notify the Court and opposing counsel and have the matter continued.

We had been informed that Factor was a citizen of the United States and our bill so alleged, but when this motion had been made Mr. McConnel had gotten very active. He had gotten into communication with Washington, Toronto, London, Los Angeles, St. Louis and some other places, and had examined a great many documents so that we felt [fol. 68] fortified in going to trial, and we were ready to go to trial, and served no notice.

We went to trial, had a trial for a day, and Judge Wilkerson entered an order there which is on the record overruling the motion to dismiss, and giving the defendants 90 days to file a statement of facts.

By the way, that was never filed.

He also set down a motion to dismiss that had been filed for October 26. Counsel had filed originally a motion to dismiss—do you want me to explain——

Q. All right, go ahead.

A. (Continuing:) Counsel had filed a motion to dismiss conta-ning points 1 to 12.. One, that the plaintiffs have a full, complete and adequate remedy at law in an action for the recovery of the money alleged to have been lost by the plaintiffs;

And, second, the amended bill of complaint does not state a cause of action of which equity will take cognizance;

And, too, that in the second amended bill of complaint the plaintiffs were attempting to bring their bill, not only on their own behalf, but on behalf of all other citizens of Great Britain similarly situated, and whose money or prop-
[fol. 69] erty had been taken from them by means of a criminal scheme hereinafter set forth, etc.; that there is no warrant in law or equity for the maintenance of a class suit of all persons who may claim to have lost money, and so forth;

Three, that the joinder of Arthur Travis Faber and Adah Hayhurst rendered the second bill of complaint multifarious as an improper joinder of parties complainant whose alleged causes of action are several in their nature;

Four, that the amended bill of complaint is multifarious in that it is offered on behalf of all other citizens of Great Britain similarly situated, and so forth, and that second bill of complaint discloses that if the said named persons have any cause of action whatsoever, they are several in their nature and cannot be joint causes of action;

Fifth, that in the amended bill of complaint that John Factor entered into a plan or scheme to obtain the money of plaintiffs by means of conspiracy, and so forth, and that the bill did not contain sufficient facts to justify relief in equity;

Sixth, that the bill had not joined the proper plaintiffs and proper defendants who were necessary to the cause of action.

[fol. 70] Shall I go right through these?

Q. Were these different points that were raised technical or were they decisive of the litigation?

A. Well, we regarded them as absolutely vital, for this reason: Here were two thousand plaintiffs. If the Court had ruled that each of these plaintiffs was required by law to bring his individual suit that would have practically ended this litigation and all litigation—as the Court remarks, we would have been absolutely through. Why? Because the costs of proving this case would amount to more than any but the largest possible claims.

So that we regarded these various points as absolutely vital.

In the meantime, however, one of the counsel had filed two more points alleging that Mr. Factor was a citizen of Great Britain, that he was born in Hull, England, and filed

affidavits in support of that, and those two points were matters that came up on October 1 and were disposed of by his Honor.

These other matters, twelve matters, went over until October 26. Counsel for defendant then asked for additional time and the matter went over until November 9.

[fol. 71] Q. Before that, on the earlier motions to dismiss, on the question of Mr. Factor's citizenship, was that heard and decided before the Court?

A. Oh, yes, that was heard and contested. We argued the matter for a day, and we had spent all the time up until October 1 in that matter preparing for the hearing on October 1; all our time, Mr. McConnell and I.

Q. In support of your position, were any authorities presented for the consideration of the Court?

A. On that motion?

Q. Or, was it largely a question of fact?

A. It was a question of fact, but we had made a very careful brief on the legal propositions that might be presented. For instance, the question of evidence, the question of hearsay statements, and the question of pedigree. The burden of proof, the presumptions of those matters we were ready to argue as a legal proposition, but I think the matter went off as a question of fact, and I am not sure how many of those legal propositions—we argued some of them, but I am not sure at what length.

Q. I assume you had some active opposition from the gentlemen on the other side?

[fol. 72] A. I will have to say that every step in this case has been ably opposed and vigorously opposed. I might go a little further than "vigorously," at times. But, anyhow, it has been ably opposed. Usually, we met five, six or seven opposing lawyers, but that matter was argued by Mr. Stansbury, mainly. I think that is the one matter that was not, in which there was not a general affray.

Q. What was the result of that motion, have you indicated?

A. Yes, I have testified to that.

When the Court set the other matter down we immediately saw that that, if decided against us, would dispose of any possible chance on the part of our clients. The result is we made a most diligent and thorough search of every

authority we could find in the Federal and State courts on those respective questions.

While our brief only covers some 50 pages it represents a very diligent effort, days and sometimes evenings on our part to see that any case decided had been inspected by us.

We argued the matter four different days before Judge Wilkerson. I remember that his Honor made the remark at [fol. 73] the end of the argument that he did not remember that he had ever permitted counsel on a motion to dismiss to take more than an hour.

He said, in fact, that in view of the complexity of this case and the amount involved—"I have given you gentlemen 4 days, and I think I know what the law is."

Counsel for defendant asked leave to file with the Court a brief, however, in support of their contentions and we asked leave to file a brief. And, along in December, the respective counsel, there were three or four firms—three briefs, I think, were filed for them. Possibly I am in error. They cited other authorities that had not been cited, so we contended, at any rate, so we made redoubled efforts then to distinguish their authorities and to support our own contentions.

We filed a memorandum on behalf of the plaintiffs and intervening petitioners with His Honor, Judge Wilkerson. Possibly, the table of contents will show its scope.

"Brief statement of facts.

"A motion will be overruled unless it is an absolutely [fol. 74] clear and certain proposition, taking all allegations to be true, the bill of complaint must be dismissed at the hearing; if either of the plaintiffs have the right to come into court, a court of equity, the bill should not be dismissed.

"2-A. Plaintiffs have a right to an accounting in equity quite apart from the doctrine of tracing funds. That was a very interesting subject also that we argued at length before Judge Wilkerson and one that we conceived to be very important.

"Plaintiffs have the right to rescind and file a bill in equity and follow the property.

"C. Plaintiffs have a right to relief by way of injunction and receivership.

"D. Plaintiffs have a right to an accounting in equity."

[fol. 75] This was just one of the points that they made. They made the point that here was a case where Mr. Factor had made various and a large number of representations which we claimed were false to various individuals. They said, "Let those individuals bring suit at law for damages," as they are advised they have no right to join in one suit, and they had a number of cases so holding.

We found, by the way, that any case that could be interpreted to support their position, they had it, indicating they were just doing as much work as we were doing.

But, we countered with this, which we believe was absolutely a well considered proposition, first, that the plan here was a general plan, and that the false representations were simply incidental. The plan stated in the amended bill was a general plan to create confidence, as we claimed, by an erroneous or false statement of the method of doing business through the Broad Street Press, largely.

Now, our authorities differentiated the position that they had taken on that principle. We had cases of Judge Taft and others holding that.

Secondly, we claimed that the situation was different [fol. 76] where there was a fund co-mingled, a co-mingled fund in which a large number of persons might be interested. In that event it was impossible, as we said, for the Court to hold that the individual plaintiffs could say, "This is my dollar, and this is my dollar." They came into the co-mingled fund and they were all entitled, as against Mr. Factor, to have their rights adjudicated in a single suit.

And, then, three, the plaintiffs and interveners are entitled to join in a single suit in equity because of their interest in a single fund. * * *

"Likewise, they are entitled to join in a single suit because they have a common point of litigation—what we claim, a common method of doing business. We had Cook v. Flag, an interesting case on that point and there were four different decisions involving that point."

Certiorari had been denied by the Supreme Court and we had other authorities that weren't quite so closely in point, but were in point, as we contended.

Four. The claim that plaintiffs have an adequate remedy at law is without merit. We analyzed all their cases. 5.

The claim that the Cestui Que Trustent are necessary parties is without merit.

[fol. 77] We filed this with the Court and the Court took the matter under advisement. Judge Wilkerson was then very busily engaged with another important matter here, and he frankly said to us that he would decide this matter finally as soon as he could, and the Court decided it on February 2 and entered an order overruling the motion and ruling the defendants to answer. That is on February 2, 1932.

Shall I proceed?

Q. Yes, go right along.

A. Mr. Levinson had informed me that they believed that they had the right to come in and have a rehearing, a reconsideration of the order entered by Judge Wilkerson. They proposed to bring the mother of Mr. Factor and his brothers, to prove certain facts——

The Court: That was the first order?

A. That was the first order. That motion was not made, however, as I remember, if the Court please, that did not come up until you overruled the second motion. That is when they brought that up, that is when that was brought up. I think Judge Wilkerson was in the Capone case, if I am not mistaken.

The Court: The Telephone case.

A. Yes, it was the Telephone case, that is true. He [fol. 78] could not hear us, but he said he would transfer the case to his Honor, Judge Woodward. We went in there and Judge Woodward said he would set the matter down and would grant leave to file affidavits to Mr. Factor.

These affidavits were filed. In the meantime we had redoubled our efforts on the facts about the question of citizenship and had come to the conclusion that Mr. Factor was a citizen of this country. So, we argued the question before Judge Woodward quite extensively.

Mr. Langworthy: How many days?

A. I don't know whether it was one or two days, I am not sure.

Counsel for Mr. Factor filed a brief in support of their position and we filed a brief.

We have practically examined, I think, every case on the question of rehearing that we could find in the books in

this matter. Here were some of the points that we relied upon, one, the burden of showing that newly discovered evidence on which a rehearing is based could not have been discovered at or before the trial by the exercise of due diligence on the part of the petitioner. That was a decision decided by Walker, Bryan and Foster, circuit judges.

Two. To entitle parties to a rehearing after an interlocutory degree on the ground of newly discovered evidence [fol. 79] they must show to the satisfaction of the Court that they have exercised due and reasonable diligence before the hearing to procure the evidence now sought to be introduced, and the facts and circumstances stating such diligence must be specifically stated, citing eight Federal authorities.

Third. (Reading:) Petition for rehearing will be granted only where, had a final decree been entered, a bill of review would lie, citing four authorities. It was our position a bill of review would not have lain here.

Four. A bill of review will be denied unless the complainant alleges therein and proves due diligence, citing a dozen or so cases.

Five. A bill of review or rehearing will not be granted where the evidence sought to be introduced is merely cumulative.

We show here that the fact that the evidence they seek to introduce by their affidavits was merely cumulative on the precise issue to which Mr. Factor had testified.

[fol. 80] Six. That the parties are entitled to have citizenship or any other issue once tried and determined; if through negligence or otherwise they don't produce their evidence the fault is their own and they must stand the consequences, citing cases similar to ours; 36 Fed. 722.

I don't believe that Mr. Gilbert, of the opposing counsel, agrees with me.

Mr. Gilbert: No, I do not; I did not then and I do not now.

[fol. 81] We had a large number of other points that we argued at length. I don't know that opposing counsel agreed with us on any proposition as we went along.

The Court: This argument was where?

A. Before Judge Woodward. Judge Woodward took that matter under consideration after briefs had been filed and about the 27th of February he filed a written opinion of some pages, a very carefully considered opinion, overruling the motion.

Thereupon, the banks—we had spent most of our time on that motion because we did not want to retrace our steps unless we had to—we had one hearing already and were perfectly willing to go forward if we could, so we spent a good deal of time on that proposition.

Then the banks came in and another defendant and filed their motion to dismiss. They claimed they were not bound by the ruling of his Honor, Judge Wilkerson. They said they were not a party to the motion and they were not bound by it.

The Court: Did Mr. Johnston argue that case?

A. Yes.

The Court: That they were not parties?

Mr. Gilbert: No, he did not argue the motion to dismiss [fol. 82] for want of jurisdiction.

The Witness (continuing): No, it was the motion to dismiss for want of jurisdiction that they claimed——

The Court (interposing): It was argued at great length, the motion to dismiss on the merits.

The Witness (continuing): Yes, he did, Judge. You see, after the motion to dismiss for grounds one to twelve had been disposed of, they went back again to the motion and were making motions for a rehearing.

The Court: That was after my time in the case.

The Witness: Yes, that was after your time in the case. Then they claimed that the banks, and another defendant, had not been joined in that motion and were not bound by it. We immediately then began a very careful analysis to prepare for that hearing. And again the counsel for the respective parties, Burry, Johnston, Peters and Dixon, and other parties, filed appearances in support of a motion of the bank to dismiss the bill of complaint.

The Court: I think we will adjourn until 2 o'clock.

(Thereupon the further hearing of the above-entitled cause was adjourned until 2 o'clock, September 21, 1932.)

[fol. 83]

FABER

vs.

FOREMAN

Before Judge Wilkerson

Wednesday, September 21, 1932—
2:00 o'clock p. m.

Court met pursuant to adjournment.
Counsel present: As before.

Mr. Kearns: If your Honor please, this is a petition of the defendant Banks for leave to file an amendment to their answer in this cause constituting a counter-claim. The counter-claim is presented herewith. It in substance recites the proceedings that have occurred outside the record, the settlement agreement, certain changes of beneficiaries that were made in the trust, a request that was filed with both trustees to conform to the terms of the settlement agreement, and submits the matter to the Court's discretion.

The Court: Are these the documents that were to be filed pursuant to an arrangement outlined in the court this morning?

Mr. Kearns: Yes.

[fol. 84] Mr. Healy; Yes.

Mr. Gilbert: Yes.

The Court: They may be filed.

Mr. Kearns: I have a draft form, if your Honor please. There is a blank in there for time to answer. I don't know what the parties wish to suggest on that.

Mr. Gilbert: I suggest that the parties all answer later, as of today.

The Court: Well, they will have to answer before the date set; shouldn't the answer be on file before the decree is entered?

Mr. Healy: Yes.

Mr. Kearns: I think it should.

The Court: On or before September 22nd.

Mr. Kearns: It is not very large, your Honor.

The Court: Is it that small?

Mr. Gilbert: Yes. It will not take a paragraph.

The Court: On or before September 22nd, then.

Mr. Gilbert: Yes.

The Court: This case will be on hearing tomorrow, probably.

Mr. Kearns: If your Honor please, I shall have a small amount of formal proof under the counter-claim, and if satisfactory I can bring them in the first thing tomorrow morning, before these gentlemen proceed.

[fol. 85] The Court: Any arrangement counsel makes is satisfactory.

Mr. Gilbert: The counter-claimant, your Honor, asks for the appointment of a guardian ad litem, and I think the Court, if there is no objection on the part of any one here, should appoint the guardian ad litem we have all agreed upon.

Mr. Kearns: Mr. Gilbert, if I may interrupt, I think the minors should be actually served, and then we should present a petition on that later in the afternoon.

Mr. Gilbert: May we interrupt the hearing later in the afternoon, your Honor?

The Court: Oh, yes.

Mr. Carter: There is one matter that comes up before this counter-claim, the dismissal of three parties there has never been any proof against, one that is not served. They are not made parties to this claim. It just clears the record.

The Court: John Factor, Bella Cohen Factor and——

Mr. Carter: We make this motion: That the Union Bank of Chicago——

The Court: Yes, that corporation, the Union Bank of Chicago, and Louise Cohen are dismissed as defendants.

[fol. 86] JOHN H. S. LEE, one of the petitioners herein, called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Direct examination (cont'd).

By Mr. Healy:

Q. When the Court recessed at noon, Mr. Lee, I think you had finished telling us about the last contest you had before Judge Woodward.

A. Except this, that we prepared briefs there of maybe twenty pages—Pardon me.

Mr. Healy: The Court has gone out.

A. Yes.

(Short interruption.)

Mr. Healy:

Q. Go ahead.

A. We prepared a brief of a number of pages on that matter, among other things supporting by authority proposition A that the defendants have no other or greater right —I might withdraw that. Will you strike that out, please? The motion on the part of the other defendant was that the bill be dismissed for the following reasons: One, that on or about the 25th day of February, 1932, there were filed herein the supplementary affidavit of various parties, naming them, certifying that Factor was a citizen subject to [fol. 87] the Kingdom of Great Britain, and not a citizen of the United States, nor the State of Illinois, and, second, that prior to February 25, 1932, when the said affidavits of defendant's relatives were filed, these defendants had no knowledge of the manner in which said relatives would testify on the question of citizenship of the defendant Factor if placed upon the witness stand, because said witnesses resided a distance from the City of Chicago, and had no opportunity to determine the manner in which they would testify. And, three, if as alleged in the affidavits the defendant John Factor is a subject of the Kingdom of Great Britain, then the Court has no jurisdiction of the cause. That was filed by Burry, Johnstone, Peters and Dixon, and by others, and that was argued at great length.

We went into the matter. They filed a brief of a number of pages, and we prepared briefs and argued the matter at some considerable length before his Honor Judge Woodward. I don't want to take up the time of the Court here, but these covered—unless the Court wants specifically to hear them—these covered some five or six different headings, that were supported by authorities. The point was not quite as clear as I had thought at first, so that we went to the pains of trying to get every authority that bore upon [fol. 88] the question, and I think that we did do so.

His Honor Judge Woodward, after oral argument and after considering the briefs, entered an order overruling the motion on the part of the defendants to dismiss. We in the meantime had filed a motion to strike the motion to dismiss, and that motion of ours to strike being argued at the same time was allowed. Then the defendants were ruled to answer, and they made a motion for leave to file a limited answer. They made the motion for leave to have the defendants file the answer, simply bringing in the question of citizenship of John Factor, and not answering the other allegations of the bill.

We resisted that on the ground that we were entitled to an answer as to all the issues, including the question of the funds they held. That was argued before Judge Woodward, and he overruled their motion, and ruled them to file an answer within a period there of possibly twenty days. Then general answers were filed and the answers showed that the banks had in their possession securities of the face value of about two million dollars, as I remember.

Mr. Gilbert: Securities that it required two million dollars to purchase.

A. Yes, two million dollars had been invested in securi-[fol. 89] ties. Now, that was about almost a year after the case was filed. In other words, we did not get to the case at issue until about a year after, after the bill was filed, the original bill.

Then the question of depositions came up. We looked at the Federal Statutes, and I was quite surprised to find that there was some considerable ambiguity at least in the decisions as to what provisions of the statute would govern with regard to foreign depositions. The fact is, some authorities squinted one way, and some squinted the other, and we made a very exhaustive search on that question, because if we went abroad, took the depositions, and then found they were taken under the wrong section, why, our time would have been wasted, and we conceived that we would have been in very bad shape.

We made a very exhaustive examination of all the authorities in that connection. We filed affidavits in support of our motions to take depositions in Chicago, Paris, London and New York. The defendants had made an exhaustive search also, and they brought in all the authori-

ties that could be cited, I think, against us, and resisted our right to take depositions. That argument occupied two or three days, if I am not mistaken, before Judge Woodward.

The Judge finally entered an order giving us the right to [fol. 90] take depositions in New York, London and Paris, but refused us the right to take depositions in Chicago, his point being that we had not made a sufficient showing under our affidavits, that we would not be able to get the witnesses to prove the facts which we wished to prove under the depositions in Chicago on the final hearing on the cause.

We carefully prepared the papers with respect to that and sailed for England on June first, practically as soon as the orders had been gotten. Arriving in England at June sixth, I went direct to London, Mr. McConnell went to Paris to examine into the law of France with regard to depositions, and to interview witnesses, to try to get the right to inspect records there to take the depositions there, and then he came over to London three days later.

Q. Well, will you tell us generally what you did in London on that occasion, at that time?

A. Well, I found—I might say that we worked there night and day. Opposing counsel told me they did the same thing, and I think they did.

Q. On your trip over, did you do any work?

A. I worked every day.

Q. With reference to this case?

A. All day long on this case.

[fol. 91] Q. On the boat, on the ship?

A. Trying to outline the proof, the order of the proof, arrange the matter as far as I could without the assistance of Mr. Wordsworth and members of his firm.

Q. How many witnesses were you contemplating would be interrogated over there?

A. We couldn't tell that matter, at the time.

Q. Oh, approximately.

A. We thought that there might be fifty or a hundred. We had to somewhat measure the number by our resources, by the resources that our clients had to devote to costs. We went on, we spent there—well, I am sure we spent over nine hours a day, we did nothing else, I was not out of London from the time that I arrived until the time we made the final settlement.

We proceeded with the taking of depositions before the United States Counsel. We introduced about 250 exhibits, I would have to count up the number of witnesses whose testimony we took. Mr. McConnell worked at least the same hours that I did.

Q. Are the depositions present in the court room?

A. Yes, that bundle is there. I notice that it is not open.

Q. Those are the depositions which you took while you were abroad?

[fol. 92] Mr. Gilbert: We will stipulate the number of witnesses, and save you that trouble.

Mr. Healy: It will be stipulated on the record, then, that this bundle of depositions is about eighteen inches long.

Mr. Gilbert: Yes.

Mr. Healy: Twelve inches high, and twelve inches broad?

Mr. Gilbert: At least that.

Mr. Healy: And takes about how many pages, occupies about how many pages?

Mr. Gilbert: About 2500 pages, I think.

The Witness: About 2500.

Mr. Carter: I don't think quite that many. 2000.

Mr. Gilbert: 2000, from 2000 to 2500.

The Witness: We, as we believe, had made great progress toward proving the case. Part of the work that we had done consisted in very careful checking of the evidence with regard to the tracing of the funds. We went into that. It is a very technical proof, and as we believe, proved the London end of it. We had in our possession the definite legal proof showing that two million dollars, as we claim showing clearly and conclusively that two million dollars, as we claim, had come directly from the Broad Street Press through Mr. Factor and through Mr. Klein to the Chicago banks. When we had been taking depositions [fol. 93] for—have I gone fully enough into that?

Q. Before you go into that, I would like to ask you this: Before you took the depositions or testimony of these witnesses, were they all interviewed in the banks?

A. Oh yes, we interviewed the witnesses, went over the facts with them to find out what each one knew, and what his angle of the situation as. Mr. Wordsworth's firm was of great assistance, because they knew some of the witnesses, all of the witnesses apparently knew the firm, it is

a very high grade firm in London, with offices down on——

Q. Lombard Street?

A. (Continuing:) —on Lombard Street, the financial street there. We conceived that Mr. Bowles was a very vital witness on certain angles of the case, I didn't know where he could be found, no one seemed to know where he was, and finally Mr. Perry, of Mr. Wordsworth's firm, got in touch with him through a personal friend of Mr. Perry's, or in some manner, and we subpoenaed him and put him on the stand.

Another very vital witness was a man by the name of Charleton, and Tamplin & Company finally got in touch with Mr. Charleton.

[fol. 94] We introduced certain original documents that were signed, as we claim, by Mr. Factor, that we thought were very important.

Q. During this time did Mr. Wordsworth's firm lend its aid and assistance in the matter?

A. From the time we reached there we were in constant conference with Mr. Ralph Wordsworth, the senior member of the firm, with Mr. Perry, as I understand a member of the firm, and with other employees there. I would suppose that we used up half of their time. Now, I cannot say exactly, but I know we were constantly there, using their office.

The Court:

Q. That was the Wordsworth firm?

A. That was the Wordsworth firm.

Q. How long were you there?

A. We were there from June sixth to July nineteen.

Q. Do they have an extensive office?

A. Oh yes, yes, though they do not have in London offices such as we have here.

Q. I know.

A. They had——

Mr. Gilbert: Four or five rooms.

A. Just a minute, and I will tell you. I think eight rooms. They kept a corps of stenographers.

The Court:

Q. I mean, about how many men would you use, how many of their men?

[fol. 95] A. Mr. Ralph Wordsworth was in constant conference with us, both in the evenings, frequently, and sometimes on Sundays, we worked Sundays as well as other days, and during the day.

Q. He was available all the time?

A. He was available all the time.

Q. In consultation about the English law.

A. Yes, and about the facts, too. These witnesses, he knew some of the witnesses. He knew the banks, and the officers of the banks, and he was very helpful in getting—in enabling us to bring the records into court, got an order of court granting us the right on the banks to produce records. He had an intimate knowledge of the records in the hands of the official liquidator, and helped us very materially in going over voluminous records that the liquidator had. I think we could not have made our proof without the active cooperation of that firm, and I appreciated that.

The Court:

Q. Did his assistants work on it, too?

A. Oh, yes.

Q. How many of them were there?

A. Just Mr. Perry, a great deal, and another assistant was there during the taking of the depositions.

Mr. Healy:

Q. Mr. Ryan?

[fol. 96] A. Mr. Ryan, yes.

Mr. Gilbert: Ryan; but he was not a lawyer.

A. No, he was an accountant, he was not a lawyer.

Mr. Healy:

Q. Did you have some considerable difficulty——

A. (Continuing:) —Then other assistants also helped us.

Mr. Healy:

Q. Did Mr. Johnson aid you at all?

A. Mr. who?

Q. Johnson.

A. Yes, I think—there were two there, and I don't remember their names. I knew them at the time, but I don't remember now.

Q. They are members of the firm?

A. They are members or employees.

Q. Yes. And did you have some considerable difficulty in tracing the funds in controversy?

A. Oh yes. In order to do that, we had to bring in quite a large number of books and records. The banks would not let us, of course, introduce any records in evidence. They produced the records, and we offered copies of them. Our proof was going along very satisfactorily, from our point of view, and finally Mr.—counsel for Mr. Factor and we got to talking about a possible settlement. They stated that if we litigated this thing out, we were going to be two [fol. 97] years at it, and I didn't think we would be that long, but I knew we would be a time, and they said that these securities in the bank had depreciated, as I have no doubt they have.

Q. To what extent had they depreciated?

A. Well, I think counsel told us that the securities, the value of the securities was about one million four hundred thousand dollars at that time. Wasn't I right about that?

Mr. Gilbert: No.

A. Well, then, I thought that was it.

Mr. Gilbert: We carefully avoided ever putting any appraisal on anything.

A. Well, you said that the value of the securities was very problematical, the cash value, and that the securities had depreciated. I certainly got a very vivid impression from our conversation that it was one million four hundred thousand dollars, and Mr. Wordsworth and Mr. McConnell did. If I am in error, if that didn't state it exactly, certainly our impression was that.

Mr. Healy:

Q. Well, how long did the negotiations continue looking toward a settlement of the matter?

A. Oh, we had negotiations there during the day, and I think it was about eight or nine or ten days, we would [fol. 98] sometimes stay up until midnight talking the matter over.

Q. And finally you reached a common ground?

A. Well, we went in—and Mr. Gilbert has spoken about our negotiations. Now, here is the way my memory is as to what it was: Mr. Gilbert suggested that we take a part of the mortgages. Finally I agreed that if they would pay one million fifty thousand dollars in cash, and give us the right to choose out of the mortgages three hundred thousand dollars worth, I would recommend a settlement to Mr. Wordsworth. Mr. Wordsworth said he would leave it to me, that I had been on the firing line here. We went to Mr. Pepys, with Mr. Gilbert and Mr. Carter. We had a conference there. Mr. Pepys said, "Well, Mr. Lee, Mr. Levinson tells me that the usual fee of attorneys over in Chicago, on a contingent matter, is about one-third." He said, "Mr. Stein, of your bar, has been over here, and has told me that you would be allowed from a third to a half. I think I ought to have some expression from you, if we are going to make a settlement here."

I said that my experience was that that was true. I said that Mr. Pepys knew what agreement I had made with Mr. Overmyer and Mr. Wordsworth. By the way, that agreement was made in January of 1932.

[fol. 99] Q. That was an agreement with reference to the division of the fee?

A. Yes, under which Mr. Wordsworth and Mr. Overmyer were to get fifty percent, and I was to get fifty percent.

Q. While you are on that subject, was anybody else to participate in the fifty percent share which you were to receive?

A. Mr. McConnell, my associate.

Q. How much was he to get?

A. Eight percent. Also—this is embraced in that, counsel for Tamplin & Company and another counsel over there helped me very much in these depositions, I agreed to pay them anything that they thought was reasonable, but no charge is made by me for that, because I cannot prove what those services are in this case, that is simply something that is my concern, not the concern of opposing counsel.

Q. That is your independent undertaking?

A. That is my independent undertaking. Originally, they were going to be paid by their clients, but they did

more work during the time we took the depositions, and that rather changed the situation.

Q. Well, will you proceed now and tell us what the arrangement was with Mr. Pepys, so far as that goes?

A. We made this arrangement. I said that if they would not oppose—I called their attention to the fact that the [fol. 100] Court here would have to fix my fee, and I couldn't agree to it, nobody else could agree to it. I said that if Mr. Pepys was willing to recommend twenty per-cent for Mr. Wordsworth and me and every one on our side, that I would accept that.

Well, he said, "I think that is very reasonable, Mr. Lee, that appeals to me. I will agree to it." Mr. Gilbert and Mr. Carter said that they had no objection, but they could not agree to it until they had conferred with their counsel.

I am giving this exactly.

Mr. Gilbert: Counsel?

Mr. Healy:

Q. Their client.

A. They said they would have to talk with their client about this sum of a million fifty thousand dollars, and the mortgages. They called up Mr. Factor—that is, I know they did, they told me so, and they said he would not agree to the question of solicitors' fee. He said I had—I don't know whether he said it, or whether it was inferred from what you said that I had forced up the price of the settlement, but he felt that he was paying solicitors' fees, and he was going to fight the thing.

Well, I said, "That's all right." He said he wouldn't pay a million fifty thousand dollars cash, that he thought the thing had fallen through. I said, "All right, we will go on [fol. 101] with our depositions, then, we will go right ahead."

Well, Mr. Gilbert got in touch with—I am telling all this in a few minutes, but we negotiated there, we negotiated for several days more, as I remember it. Finally Mr. Gilbert said that Mr. Factor would agree to this, that he would agree to pay a million, instead of a million fifty thousand dollars, and the mortgages, and reserve the right to object to the solicitors' fees. I said that was all right with me, I would agree to that.

We had another conference with Mr. Pepys, and he said, "Well, Mr. Lee, won't you agree to ask for not over twenty percent?" "Well, no," I said, "I will not agree not to ask for over twenty percent. I am not going to have it said that you or Mr. Factor or anybody else had been the cause of my agreeing to anything. If you want to make an agreement, I will go into court and ask for what I think is fair."

So that was the way it was left, no agreement was made on that fee, and as a result of further negotiations, we compromised this settlement agreement. I insisted that the fee be fixed on a contingent basis. I said, "Why, if I have lost out on this thing I would have never gotten anything. Pepys admitted in our conferences that the work that has been [fol. 102] done was very well done, and spoke in a very complimentary way about me. I said, "It is only fair, if we make this agreement, that the Court should take into consideration the fact I would not have gotten anything if this matter had not been successful, and we had not gotten this money under the settlement."

Well, we negotiated backwards and forwards on that, and finally Pepys said that was all right, he would agree to that providing the court in England would O. K. the matter. He said he would write a letter to all of the persons interested, setting out in general the contract, and saying that any person might come in and inspect the contract in his office. He wrote the letter, a copy of which I have here. The agreement provided that Mr. Wordsworth and I should write a letter and these letters were first approved by counsel for Mr. Factor before we sent them out. I have these two letters that we sent out, Mr. Healy.

Mr. Healy: I will just offer these for the inspection of the Court.

Q. And these letters, as you understand it, were sent to all of the parties in interest?

A. Mr. Pepys so informed me. May I modify that? Mr. Pepys informed me that they were sent to all of the shareholders of the Vulcan and Rhodesia Company. He informed [fol. 103] me, or somebody informed me, Mr. Newman, possibly, that those shareholders also held seventy percent of the stock, or thereabouts—isn't that right, seventy percent? —of the stock of the Asbestos Trust, therefore, while they did not get them as shareholders of the Asbestos Trust,

they got them as shareholders of the Vulcan and Rhodesia.

Q. And this letter, Mr. Lee, gave to the parties to whom it was sent the opportunities to inspect the settlement agreement?

A. Yes.

Q. And to acquiesce in or object to the fee which was to be allowed you by this Court?

A. Yes. I asked the liquidator why he didn't put in the word "contingent". He said that he used the word that would indicate that, but that the word "contingent" probably would not be understood over there. What is the term he used there, Mr. Healy?

Q. Well, he said your fee would probably be fixed on a percentage basis.

A. On a percentage basis; he said that would indicate to the people there that it was contingent.

Q. And it also contains this language: "And Mr. Lee informs me that he will ask for an allowance of twenty percent or more on the above mentioned sum of approxi-
[fol. 104] mately 360,000 pounds."

A. Yes.

Q. Now, so far as you know, have any of the parties in interest objected, filed a protest of any sort, against that allowance?

A. 99½ percent of our clients have signed the document attached approving the settlement. Mr. Wordsworth tells me that two of the people are in India somewhere, he cannot trace them, that others cannot be found; there are not a large number of people, and he said that one man, having a claim of five pounds, which was about seventeen dollars, has objected, or said that he might object, and that that is the only objection that he had heard of from any one. He said he had had numerous letters from our client congratulating him, and indicating that they were highly satisfied with the settlement.

Q. And the man whom you say might object is not an intervenor here?

A. No, he is not an intervenor. And my understanding was that if he objected, he was going to send over to the court here his objection, and as far as I know, no objection has been made.

Q. Now, as I understand it, Mr. Lee, 99½ percent of your clients have acquiesced in this arrangement, at any rate,

[fol. 105] have filed no protest or objection in answer to the letter which was sent out by the liquidator.

A. Not only that, but they have signed the paper under their hands, specifically agreeing to the thing, and confirming it.

Q. Have any of the parties not represented by you, but who claim an interest in the fund, acquiesced, and if so, to what extent?

A. Every one—well; 98 percent of every one, I am informed by counsel here, and by Mr. Wordsworth, have practically agreed. It is possibly more than that now. That was some days ago.

Q. This settlement agreement was finally entered into, was it?

A. May I add this matter.

Q. Yes.

A. Mr. Wordsworth notified, sent another letter, to each of the addresses of the few people whom we represented, saying that we were going to attempt to carry this settlement through, that it was to the interest of the parties, and they were going to do that.

Q. Do you have the settlement agreement here, one of the original copies?

A. Yes, but it is my original copy.

[fol. 106] Q. Yes.

A. Yes, I have it here.

Q. You have no objection to the Court seeing it, of course?

A. Oh, no, no, not at all.

Mr. Gilbert: I think the Court has my original.

Mr. Healy: I just want to have it identified, so it will be before the Court in some way, be before the Court in some proper way.

Mr. Gilbert: Yes. All right.

Mr. Langworthy: It is a matter of record here. We filed a copy of it.

Mr. Healy: This is one of the originals, and it is before the Court now for his inspection, and for any use that any of the parties want to put it to.

Mr. Langworthy: Are you going to have them marked as exhibits? Have you had them marked?

Mr. Healy: I didn't do that formally. I will do that if you want. Counsel suggests I should have these letters

marked as exhibits, so I will ask to have the two documents marked Lee's Exhibits A and B, respectively, and formally offer them in evidence.

Mr. Gilbert: No objection.

Mr. Healy: What's that?

Mr. Gilbert: No objection.

(Which said documents, so offered and received in evidence, were marked Lee Exhibits A and B, respectively, and the same are in the words and figures following, to wit:)

LEE EXHIBIT "A"

[fol. 107] All communications should be addressed to: "Official Receiver in Companies Liquidation," and the Name of the Company quoted.

Telegrams: "Concluding, Estrand, London."

Board of Trade, Department of the Official Receivers in Companies, Liquidation, 33, Carey Street, Lincoln's Inn

London, W.C.2. 20th July, 1932.

DEAR SIR (or MADAM),

In the Matter of Broad Street Press Limited, In Liquidation. In the Matter of Vulcan Copper Mines Limited, In Liquidation. In the Matter of Rhodesia Border Mining Corporation Limited, In Liquidation.

In my capacity as Liquidator of the three above-named Companies, I am addressing this letter to the shareholders of the Vulcan and Rhodesia Companies to ascertain whether they desire me to make the necessary application to the Court to obtain the approval of and to carry into effect an agreement expressed to be made between me as Liquidator of the three above-namd Companies, John Factor (sometimes known as Jacob Factor) Ralph Wordsworth and John H. S. Lee for the settlement of the claim which Broad Street Press Limited has against Jacob Factor for the repayment of a sum exceeding £600,000 in respect of moneys received by him out of the banking account of Broad Street Press Limited, and of all other claims which the three above-named Companies or I, as the Liquidator thereof, have against Jacob Factor, Rella Cohen Factor, Arthur Jack Klein and Harry Geen.

Jacob Factor left this country shortly before the date of the Order for the compulsory winding up of Broad Street Press Limited and is as present resident in Chicago beyond the jurisdiction of the Court in this country.

You will remember that on the 26th August last Messrs. Wordsworth, Marr, Johnson & Shaw, Solicitors of 39 Lombard Street, London, E.C.3. sent you a circular letter informing you that Mr. John H. S. Lee, a Chicago Lawyer had filed a Bill in the District Court of the United States for the Northern District of Illinois on behalf of Arthur Traviss Faber and Adah Hayhurst alleging that they and others had been defrauded by Jacob Factor in connection with the sale of shares in the Vulcan, Rhodesia and other companies and that they were all interested in certain funds alleged to be part of the proceeds of such alleged frauds which were deposited in two Banks in Chicago. The Bill was so framed as to embrace all other persons alleged to have been similarly defrauded.

Substantially, the persons for whose benefit the proceedings in Chicago were instituted and the persons entitled to make claims in the liquidation of Broad Street Press Limited are the same, namely, the shareholders of the Vulcan and Rhodesia Companies of whom you are one, and the result sought to be achieved by such shareholders by supporting the proceedings in Chicago and proving in the liquidation of Broad Street Press Limited is the same, namely to recover the sums paid by those sharefolders for Shares in the Vulcan and Rhodesia Companies.

The proceedings in Chicago are still pending and are being strongly contested on both sides, and several attempts to reach a compromise have failed.

As a result, however, of difficult and protracted negotiations, (to which Messrs. Wordsworth & Co. and Mr. Lee as representing the Plaintiffs in the proceedings in Chicago have been parties) the said agreement has now been concluded with the legal advisers of Mr. Factor, which is subject to:

(a) the consent and approval of the Plaintiffs intervenors and others supporting the proceedings in Chicago and the shareholders of the Vulcan and Rhodesia Companies to the extent indicated below.

(b) the approval of the Agreement by the High Court of Justice in England.

(c) the disposal of the proceedings in Chicago.

The agreement is available for inspection at this office between the hours of 10.0 a.m. and 4.0 p.m. but its main terms can be summarized as follows:

1. Mr. Factor to pay out of the funds deposited with the said banks $1,000,000 in cash, and mortgage securities to the face value of $300,000 (equivalent at the present rate of exchange to approximately £360,000 in all) to be applied as follows:

(a) In payment in full of the claims of the original Plaintiffs in the proceedings in Chicago, as the result of whose efforts the funds were discovered and held in the Chicago banks, (this will involve a sum of £5,725).

(b) In payment of Mr. Lee's remuneration and disbursements to be fixed by the Judge of the said District Court (this remuneration is entirely within the discretion of that Court; it will probably be fixed on a percentage basis and Mr. Lee informs me that he will ask for an allowance of 20 per cent. or more of the above mentioned sum of approximately £360,000) and

(c) The balance to be paid to me as Liquidator of Broad Street Press Limited.

2. The above balance to be accepted by me as such Liquidator in full satisfaction of all civil claims by the three above-named Companies against Mr. Factor his wife and his associates Mr. A. J. Klein and Mr. H. Geen.

3. The shareholders in the Vulcan and Rhodesia Companies who acquired their shares from or through Broad Street Press Limited (including those persons who so acquired shares in such Companies but may not have received delivery thereof) to be admitted to prove as creditors in the liquidation of Broad Street Press Limited for the sums paid by them for their shares (less the amounts received or receivable by them by way of return of capital in the liquidations of the Vulcan and Rhodesia Companies).

4. It is an express condition that shareholders in the Vulcan and Rhodesia Companies to the extent of not less than 75 per cent. of the issued capital of those Companies (including therein the holders of 90 per cent. of such issued capital held by the shareholders who authorised Mr. Words-

worth or Mr. Lee in writing to act for them in the said proceedings) shall approve the settlement and agree to release Mr. Factor, Mrs. Rella Cohen Factor, Mr. Klein and Mr. Geen from all claims against them or any of them in connection with the dealings of such shareholders with Broad Street Press Limited, either as purchasers of shares in the Vulcan Company and/or the Rhodesia Company and/or the Asbestos & Holdings Trust Limited and/or any other Company.

After consultation with Mr. Wordsworth and Mr. Lee and after careful consideration of all the circumstances I came to the conclusion that it would be in the best interests of the creditors of Broad Street Press Limited and the shareholders of the Vulcan and Rhodesia Companies to compromise these matters on these terms. I estimate that the amount payable to me under the agreement should enable a distribution of about 5s. in the £ to be made to the creditors of Broad Street Press Limited including the shareholders of the Vulcan and Rhodesia Companies.

I have accordingly entered into the agreement with Mr. Factor under which he has paid me a deposit of $100,000, and under which I have agreed to send out this circular to the shareholders of the Vulcan and Rhodesia Companies, and to recommend them to approve the settlement and to give the release set out in the form attached hereto. I have further agreed that, upon such shareholders approving the settlement to the extent above referred to, I will apply to the High Court for its approval.

If you approve of the proposed settlement, which I recommend you to do, you should sign the form attached to this letter and return it to me in the accompanying envelope.

As the agreement becomes null and void unless the necessary consents of the Vulcan and Rhodesia shareholders are received within a limited number of days it is of the utmost importance that there should be no delay on the part of those who approve the proposed compromise in signing and returning the attached form to me.

I am, Sir or Madam, Your obedient servant,

G. D. Pepys, Senior Official Receiver.

[fol. 108] This form, when signed, should be detached and posted in the enclosed envelope; no postage stamp is necessary.

To the senior official receiver as liquidator of Broad Street Press Limited, Vulcan Copper Mines Limited, and Rhodesia Border Mining Corporation Limited, (all in liquidation), 33 Carey Street, London, W.C. 2, and John Factor (sometimes known as Jacob Factor):

I approve of the proposed compromise as explained in the letter of the Senior Official Receiver dated the 20th July, 1932, and if and when the terms of the agreement therein mentioned (made between the Senior Official Receiver, John Factor, Ralph Wordsworth and John H. S. Lee on the 19th July, 1932,) are carried into effect, I release Mr. Factor, Mrs. Rella Cohen Factor, Mr. Klein and Mr. Geen from all claims which I have or may have against them or any of them as a result of my dealings with Broad Street Press Limited, as a purchaser of shares in Vulcan Copper Mines Limited and/or Rhodesia Border Mining Corporation Limited and/or Asbestos and Holdings Trust Limited or otherwise and authorize the proceedings in Chicago to be disposed of on the terms of the said agreement.

Dated this — day of July, 1932.

Signature: —— ——. Address: —— ——.

[fol. 109] LEE EXHIBIT "B"

Telegraphic Address: "Amalgamate Stock, London."
Telephone Nos: Royal 3944 & 3945.
Agents in Cairo: Perrott, Russell & Fanner, 28, Sharia-El-Maghraby.

39 Lombard Street, London, E.C. 3

July 20, 1932.

DEAR SIR (or MADAM):

In the District Court of the United States for the Northern District of Illinois, Eastern Division. Arthur Traviss Faber et al. vs. Foreman-State Trust & Savings Bank et al.

We are sending you this letter under cover of a letter of even date which is being addressed to you by the Senior Official Receiver explaining an Agreement under which, subject to the approval of the shareholders in the Vulcan Copper Mines Limited and the Rhodesia Border Mining Corporation Limited and the High Court as therein mentioned,

the proceedings in Chicago, referred to in our circular letter to you of the 26th August last, are to be settled by the payment of a sum in cash and securities amounting in all to about £360,000. As indicated to you by the Senior Official Receiver the said proceedings have been vigorously pursued and defended. The Defendants have made several unsuccessful efforts to get the proceedings dismissed on technical grounds. Mr. Lee, who has been in London for the last five weeks taking evidence in the said proceedings, is confident that if they have to be continued, he could bring them to a successful conclusion. At the same time, bearing in mind the complexity of the questions involved, the litigation might well last for another two years, and a number of persons supporting the proceedings have already intimated [fol. 110] that they would prefer to share in the distribution of a fund which is now being ascertained, rather than to take the chance, however good, of recovering a larger sum later on. Accordingly, Mr. Lee recommends you to accept the settlement embodied in the Agreement. We do not hestiate to endorse his recommendation. We have little doubt that you will also accept his advice and that you will join us in congratulating him upon the result of his efforts.

Put quite shortly, the Agreement provides that the sum payable thereunder to the Senior Official Receiver as Liquidator of the Broad Street Press Limited is to be distributed among the creditors of that Company. The Agreement also provides that you are to be admitted as one of the creditors of the Company for the sum you paid for your shares in the Vulcan Copper Mines Limited and/or the Rhodesia Border Mining Corporation Limited, less any sum you may receive by way of return of capital in the liquidations of those Companies.

We desire to make special reference to your position should you have purchased from the Broad Street Press Limited, and still retain, any shares in the Asbestos & Holdings Trust Limited. It is one of the terms of the agreement that you are to release Mr. Factor, Mrs. Rella Cohen Factor, Mr. Klein and Mr. Geen from any claim you have, or may have, against them or any of them in respect of such shares. If you hold any shares of the Asbestos & Holdings Trust Limited purchased as aforesaid, you would be at lib- [fol. 111] erty to file such claim as you might think fit with the Liquidator of the Broad Street Press Limited in respect

thereto, but we express no opinion as to the admissibility thereof.

It is an important condition of the Agreement that the holders of not less than 90% of the issued capital of the Vulcan Copper Mines Limited and the Rhodesia Border Mining Corporation Limited held by shareholders who authorized us or Mr. Lee to represent them in the said proceedings shall approve thereof. If, as we certainly anticipate will be the case, the holders of such 90% do approve the settlement, we shall do all we can to get the settlement carried out as quickly as possible, in which event and in the interests of the great majority of the shareholders who will have approved the settlement, Mr. Lee would be compelled to withdraw as Attorney for any persons who had failed to approve the settlement, or objected thereto, leaving such persons to take such action as they think fit. On the other hand, unless 90% of the shareholders above referred to promptly approve the settlement, the said proceedings would be continued as vigorously as heretofore, in which event, however, we should be obliged to ask for a further contribution towards the costs, charges, and expenses thereof. The contribution already made has been carefully husbanded, and only used for essential disbursements, but the out-of-pocket expenses of the proceedings, especially the costs of taking the evidence, have been a good deal heavier than we had reason to anticipate. If the settlement is ap- [fol. 112] proved and carried through, you will get back in full any contribution which you have made towards the costs of the proceedings in addition to your share of the moneys to be paid under the said agreement.

Finally, we should like to emphasize that, if the settlement is to be made, it is of the utmost importance that it should be made promptly, and if you are in favour of the settlement, we would ask you to sign and return to the Senior Official Receiver the memorandum of release which is set out at the foot of his letter.

Yours faithfully, (Sgd.) Wordsworth, Marr, Johnson & Shaw.

I have read and approve the above letter and strongly recommend you to accept the settlement.

(Sgd.) John H. S. Lee.

[fol. 113] Mr. Healy:

Q. Will you state to the Court, Mr. Lee, very briefly, just what this settlement agreement effects?

A. Well, the vital thing, of course, is the payment of a million dollars in cash. The question came up whether it should be in pounds or in American money.

Mr. Gilbert: Dollars.

A. I wanted it in American money, because I thought the pound was going down, and it did go down. In other words, now the pound is a good deal less than it was then, instead of being 360,000 pounds, it is probably nearer 390,000 pounds.

Q. What is the change now.

A. I don't know. The First National gave it to me the other day, I figured it out, and unless I made some blunder, it was 390,000 pounds instead of 360 now. But anyhow, it is a million dollars in cash, three hundred thousand dollars in face value of notes secured by first mortgages, first mortgages being chosen by the agent of Mr. Pepys and J. Pierpont Morgan & Company, and by myself, from among the mortgages held by the bank.

Mr. Healy:

Q. Mr. Langworthy made some reference in his discussion of the matter with the Court this morning to a conference between you and Mr. Pepys with reference to the amount of the fee that you would charge. Have you covered your conversation fully?

[fol. 114] A. Yes, but I have not covered his suggestion, probably because I am a little stupid, I don't quite get now what he charges that I failed to tell Mr. Pepys. I was not representing Mr. Pepys. He said that Mr. Gilbert and Mr. Carter and I had failed to tell something to Mr. Pepys. I thought we told Mr. Pepys everything we knew. Certainly we told him everything he asked. My understanding of his suggestion is that we knew that we could not charge a fee on a contingent basis, and therefore should not have permitted him to enter into an agreement specifically providing that it should be charged on a contingent basis. That is not my understanding of the law at all. I don't believe that is the law. He had an agreement to handle it on a con-

tingent basis. He understood that. It had been with his knowledge and consent throughout.

I think if this matter had gone to a final hearing, these clients, each of them, would have been entitled to their proportionate share, and the Court would not have needed to necessarily have this go through the hands of Mr. Pepys. He knew all that, and it was with that knowledge, and my understanding is that under the law, if the fact is that an attorney, if unsuccessful, would get no compensation, which was the situation here, that that is always a matter that the [fol. 115] Court will take into consideration. If that is not the law, then if I did not state it to Mr. Wordsworth it is because I don't know what the law is.

Q. When you talked with Mr. Wordsworth, was he represented by counsel?

A. Oh yes, he was represented by Mr. Clark, an eminent counsel.

The Court: Mr. Wordsworth, you say?

Mr. Healy:

Q. I mean Mr. Pepys.

A. Yes. Mr. Pepys. He was represented by Mr. Clark, quite eminent counsel. He said he wanted to be advised by some one who hadn't any possible interest in this matter, apart from his interest. He employed a Mr. Clark, a well known solicitor in London. He said he would rather in this matter not have Mr. Wordsworth, because, while Mr. Wordsworth had represented him in a great many matters, and he had confidence in him, Mr. Wordsworth had an agreement with me, and he would rather have independent counsel, and Mr. Clark was with him in every negotiation, and advised him, and he acted under Mr. Clark's advice.

Q. Did he also have the suggestion or advice, independently of you, of an American lawyer?

A. Yes, he said he had been advising with an American [fol. 116] lawyer of standing, and was acting also with his advice.

Q. Do you remember the name of that man?

A. I think his name was Lee.

Q. Not John H. S. Lee?

A. No, that was another Lee whom I haven't the privilege of knowing.

Q. Campbell Lee, is that it?

A. Campbell Lee. He was a well known barrister of London.

Q. But a man who had been admitted to practice in this country?

A. Well, he said he was an American lawyer, and said he was a man of quite unusual ability. I never met him.

Q. Now, along before the settlement was made, of course you had some sort of arrangement or contract with the client whom you then represented with reference to your fee?

A. I had had originally an agreement with Mr. Faber, with Mrs. Hayhurst, and then an agreement with each of the intervening petitioners.

Q. Have you got a copy of the contract, in so far as it relates to your fees, paragraphs 2 and 3?

A. Yes. I haven't it here. I have it at the office. I think counsel, Mr. Langworthy, has it right here.

Q. Yes. Isn't that it at the top of the page (handing document to the witness)?

A. Yes, it is.

[fol. 117] Q. That is a correct copy of the language contained in the contract?

A. Exact.

Q. The original contract?

A. Mr. Langworthy has one of the documents here.

Q. Will you read that to the Court, please?

A. It is as follows: "That you"—that is I—"will look for remuneration for your services only to any funds which may be recovered in such proceedings. But out of any funds to be recovered in such proceedings you are to be paid in respect of your remuneration a sum or sums which may be allowed by the Court to the plaintiff in such proceedings as attorneys' fees, or which the Court may think a reasonable fee for your services, taking into consideration the services so rendered and the funds recovered." The contract under which the settlement is based provides that the attorneys' fees to be so fixed and determined by the Court shall be fixed upon the basis that the services have been rendered on a contingent fee basis.

Q. Now, you gave to Mr. Langworthy, as I understand it, an itemized statement some days ago showing in detail what services, what legal services, you rendered in this matter.

A. Yes. The Court entered an order with my consent, but I furnished him that statement, and I furnished him— [fol. 118] I attached to it a copy of the docket entries in the case for his convenience, and also a preliminary statement of——

Q. That is the statement, the original statement which you furnished counsel?

A. This is the original statement that you handed to me.

Q. And does that contain a true and accurate statement or recital of the services which you rendered in this matter and the time that was employed?

A. It does, together with preliminary facts that are the fact—preliminary statements that are the fact, and a true copy of the docket entries in this case.

Q. This statement shows, Mr. Lee, as I read it, that the time which you actually gave to this matter from its inception in May, 1931, until your return to this country from England in July of this year is 241-1/24 part of a day.

A. Yes. That figures the hours on the basis of a six-hour day. That is, if I put in a day, I just called it a day, no matter how many hours I spent, but if I put in a certain number of hours, I figured a legal day to be six hours, in accordance with the practice that I understand is quite prevalent.

The Court:

Q. Does that include all your time you spent in court? [fol. 119] A. Yes, I think so. I was four days before your Honor on one matter, one day on another, and I was two days before Judge Woodward on one matter, and four days on another, but I would say two weeks of time would cover it.

Q. Two weeks in court?

A. I worked harder out of court than in court, if the Court please.

Mr. Healy: I offer this statement in evidence, and ask it to be marked Lee Exhibit C.

(Which said document, so offered and received in evidence was marked Lee Exhibit C, and the same is in the words and figures as following, to wit:)

[fol. 120] LEE EXHIBIT "C"

Statement of John H. S. Lee

I reside at 1225 Sheridan Road, Evanston, Illinois. I graduated from Harvard College in 1896 and from Northwestern University Law School in 1898. Later I was a Professor of Law at Northwestern University Law School for some time and until my court duties compelled me to resign, teaching, among other things, Equity and Trusts. I was Assistant State's Attorney for about two years during the administration of Charles S. Deneen, was later a member of the firm of Musgrave, Oppenheim & Lee and am now associated with former Governor and Senator Charles S. Deneen and John J. Healy under the firm name of Deneen, Healy & Lee. During the last fifteen years I have been rather continuously engaged in handling litigated matters, on the Equity side of the court, and during such time have had charge of a considerable amount of important litigation, involving millions of dollars, in which, fortunately for my clients, I have been quite uniformly successful.

Mr. Thomas C. McConnell, my assistant and associate throughout this case, has practiced law for over ten years; is likewise a graduate of Harvard College, and is a graduate of Harvard Law School. He has also had a very considerable experience in Chancery matters and has assisted me in investigating the law and facts in this cause under an arrangement by which I am to pay him an amount in addition to his regular compensation.

The original bill, making these Banks defendants, was prepared somewhat hurriedly, because we believed that prompt action was necessary in order to conserve the funds on deposit and safeguard the rights of my client. Thereafter motions were made by the various defendants to dismiss the bill on the ground that it did not properly allege sufficient facts to constitute a valid action in equity against the defendants, either jointly or severally. At the time the original bill was filed the whereabouts of John Factor could not be ascertained by us. Shortly after the original bill

was filed, however, he gave himself up, and we thereupon made him and his wife, among others, parties to the bill. The Second Amended Bill of Complaint, consisting of some forty-five pages of printed matter, was filed on July 7, 1931. [fol. 121] Our analysis of the many facts coming to our knowledge had proven to us that the plan was wider in scope than we had at first supposed. The Second Amended Bill sets forth the plan which, as we contended, such facts had shown. It alleged, among other things, that the defendant John Factor, acting in concert with others, had obtained from the plaintiffs and a large number of other British subjects a number of million dollars by means of the plan set out at length in the bill; that over $2,000,000 of this money so obtained had been deposited by or through Factor in certain Banks in Chicago, already defendants to the bill. The bill was filed on behalf of the plaintiffs and all others similarly situated who claimed an interest in the commingled fund; and at a later time I filed an intervening petition on behalf of some eight hundred persons holding claims aggregating well over $1,500,000.

The issues of law and fact presented in the case were unusually complicated, and every step in the case was fought by counsel for the respective defendants both ably and at times not only vigorously, but often bitterly. Everything was said on behalf of the defendants which in our judgment could be said, and the arguments advanced showed that counsel had exercised a most unusual industry in collecting any authority which might be conceived to support their respective contentions. My associate and I were sometimes opposed *my* more than six attorneys, and it required almost a year to dispose of the numerous motions and petitions and to get the case at issue. In the interim the following motions, most briefly stated, among others, had been made by the defendants and had been argued at length by the respective counsel:

(a) Motion to dismiss the original and Second Amended Bill on the ground of diversity of citizenship;

(b) Motion to dismiss on further Grounds numbered 1 to 12, inclusive;

(c) Petition for a re-consideration and re-hearing of the order entered by his Honor Judge Wilkerson on October 1, 1931;

(d) Motion by various other defendants to dismiss the Second Amended Bill;

(e) Motion for leave to file a limited Answer;

(f) Objections to our Motion for leave to take depositions.

[fol. 122] When the answers of the defendants, in pursuance of the Order of Court, were finally filed, we immediately filed petitions to take the depositions of witnesses in Chicago, New York, London and Paris. These petitions were strenuously opposed, but, as the result of a somewhat extended argument, our right to take depositions in New York, London and Paris was granted, while the right to take depositions in Chicago was refused.

Thereafter and on June 1st, 1932 we sailed, and I was in London continuously on this mission from June 6, 1932 until July 19, 1932. My associate, Mr. McConnell, had gone direct to Paris to investigate the law and to interview witnesses there, and arrived in London some three days later, or on June 9th, after which time he was continuously in London until July 19th.

The settlement agreement, made on the 19th day of July, 1932, as the result of some days and evenings of continuous negotiation, provided, so far as solicitors' fees were concerned, that:

"The attorney's fees of Mr. Lee shall after hearing first had thereon as hereinafter provided be fixed and allowed to the plaintiffs and intervenors in said cause pending in the United States District Court for the Northern District of Illinois, and shall be charged only against the money and securities mentioned in Clause 1. hereof (being the moneys and securities in the hands of defendant Banks) and shall be paid to Mr. Lee as follows: Three-thirteenths thereof in notes (that is, in the notes secured by mortgages held by defendant Banks) and ten-thirteenths thereof in cash; such attorney's fees to include upon proper proof thereof such legal services as have been rendered to Mr. Lee and which Mr. Lee had obligated himself to pay. * * * The attorney's fees to be so fixed and determined by the Court shall be fixed upon the basis that the services have been rendered on a contingent fee basis."

The actual cash value of the assets in the hands of the defendant Banks at the time of the settlement was, as

stated to us by opposing counsel, about $1,400,000. As the result of the litigation and settlement thereof the defendant Factor is to turn over $1,000,000 in cash and $300,000 face value in notes secured by First Mortgages to be chosen by a representative of Mr. Pepys and myself from the mortgages held by the First National Bank.

[fol. 123] (a) To exploring the question whether the suit on behalf of our clients should be at law or in equity, and to preparation and filing of Original Bill of Complaint and short Amendment thereto; to interview with Mr. Haggard, United States Consul, to try to get additional facts; to interviews with Mr. Overmyer for the same purpose; to gathering facts from various sources, including copies of voluminous statements and affidavits later furnished to us by Mr. Overmyer; to carefully analyzing the facts in order to ascertain the plan under which the moneys were obtained; to preliminary search of law and decisions in re plaintiffs' right to amend original bill; to examining the law with regard to the sufficiency of the verification of the original bill; to examining the law with regard to the remedy of the plaintiffs, including their right to sue in equity and their right to institute a class suit; to examination of law with regard to the right of a Receiver appointed in a foreign jurisdiction to sue in the United States Court; to examining the defendants' respective motions to dismiss the original bill and motions to dismiss the Second Amended Bill; to preparing Second Amended Bill, consisting of forty-five printed pages, which set forth the plan shown by an analysis of the facts which had come to our notice, including services to July 2, 1931:

26½ days—17½ hours.

(b) In England in July and September 1931.

To conference in London with Templin & Company and Mr. Darling, the solicitors for the Rev. Mr. Faber and Mrs. Adah Hayhurst; to conferences with Captain Lord, a parishioner of Rev. Mr. Faber, in London and at his home; to conference with Rev. Mr. Faber at his home Burworth-on-Tees; to conferences with Mr. Ralph Wordsworth, with Mr. Pepys and with Mr. Newman, all in London, England; to telephone calls and correspondence with Mr. Wordsworth while I was in Italy in re activities of a Mr. Hawkins with respect to a possible petition in bankruptcy against the

Broad Street Press in the United States District Court and in re the application for a Receiver on our part to preserve the funds (I haven't a detailed statement of the actual hours spent in these matters, but know that they occupied practically all of my time during the two weeks that I was in London).

10 days.

(c) September 17, 1931 to October 1, 1931.

I r*eut*ned to Chicago on September 17, 1931, and went over the facts that had transpired in the United States in the Factor case during my absence, with Mr. McConnell; to reviewing the facts that he had ascertained with respect to the case and with respect to our ability to prove that the funds of our clients had been deposited by Factor in defendant Banks; to further examining evidence in re citizenship of Factor; to examining data sent to us by persons wishing to intervene to examining law and preparing brief in re right of intervention; to preparing and presenting petition for leave to intervene; to examining questions of [fol. 124] law in re burden of proof on question of citizenship, the admissibility and weight of the evidence, and to preparing for hearing set October 1st and conducting such hearing:

11 days—14 hours.

(d) October 2, 1931 to January 1, 1932.

To careful preparation for argument in opposition to defendants' motion to dismiss for reasons numbered 1 to 12 inclusive (see Motion in file), including analysis of authorities cited by the defendants in preliminary brief and careful search for authorities in support of the various propositions controverting, as we believe, defendants' position; to preparing brief on the part of the plaintiffs for oral argument before his Honor Judge Wilkerson; to oral argument on November 12, 13, 16 and 17; to further examination and analysis of many authorities submitted by counsel for defendants to the court in typewritten and printed briefs in support of oral argument; to exhaustive further search of authorities and preparation of brief of over fifty pages in support of position advanced by the plaintiffs upon oral argument; to conferences with Senator Denson and later with Senator Deneen, Mr. Levinson and Mr. Over-

myer, in re possible settlement; to briefing up various questions with respect to eventiary points, etc.:

31-1/12 days—66½ hours.

(e) January 1, 1932, to March 5, 1932.

To correspondence with Los Angeles and Canada in re Factor citizenship and to making further examination with regard to such facts; to conferences with Mr. Levinson and Mr. Overmyer in re certain facts asked for by Mr. Pepys in connection with proposition which Mr. Levinson had theretofore made to Mr. Pepys to settle the case; to close examination of authorities in re right of defendants to a rehearing in the Federal Court; to examining motion filed by John Factor and Rella Factor for a re-hearing and a re-consideration of the orders upon the question of citizenship theretofore entered; to appearing before Judge Wilkerson and later Judge Woodward in opposition to the motion made by John Factor and Rella Factor for a rehearing; to examination of brief submitted by defendant in support of motion; to preparing and presenting brief in opposition to the motion; to oral argument before Judge Woodward:

17-1/3 days—32 hours.

(f) March 5, 1932, to March 25, 1932.

To examination motion of defendant Schwartz and defendant Banks to dismiss bill; to appearing in opposition thereto; to examining the law with respect to the remedy of the plaintiffs in opposition to said motion; to preparation of motion to strike; to exhaustive search of authorities with respect to the rights of the plaintiffs in the premises, and to preparing brief in support of said motion to strike; [fol. 125] to arguing the motion to strike before his Honor Judge Woodward; to examining additional affidavits filed by the defendants in support of their motion; to appearing and resisting motion for issuance of subpœna duces tecum; to appearing and resisting motion on the part of defendants for leave to file a limited answer to Second Amended Bill:

8-2/3 days—9½ hours.

(g) March 26, 1932, to May 31, 1932.

To examination of Federal Statutes in re conditions upon which depositions may be taken in United States and foreign countries under such statutes; to examining the au-

thorities interpreting the provisions of the statutes; to examining apparently inconsistent decisions upon the subject; to carefully preparing petitions to take depositions in Chicago, New York, London and Paris; to preparing affidavits in support of petitions; to examining objections filed by defendants to the taking of depositions and affidavits filed in support thereof; to argument before Judge Woodward on May 21, 22, 23 and 24, on the respective motions; to preparation of motion to strike portion of defendants' answers therein again alleging that Factor was not a citizen of the United States; to examination of witnesses and records in New York City in order to prepare for the taking of depositions in that city.

29-1/6 days—32½ hours.

(h) June 1, 1932 to June 6, 1932.

To examination of volumes of affidavits and statements on trip from New York to London:

40 hours.

(i) June 6, 1932, to June 19, 1932.

To time spent in London, England, from June 6th to July 19th. The entire time of both Mr. McConnell and myself was spent in interviewing witnesses, in collecting facts, in inspecting records, in taking depositions, from the time of our arrival in London down to and until about the last ten days that we were in that city, during which latter time we were continuously engaged in negotiations with regard to a possible settlement. While I haven't an itemized statement of the hours spent, I am certain that on an average we spent more than nine hours a day continuously on this cause, or 396 hours.

To time necessary to return to office, 6 days.

Total time from May 20, 1931, to July 26, 1932, 139¾ days—607¾ hrs.

Figuring the days at the rate of six hours per legal day would make a total of 241 1-24 days. Since my return I have been engaged in various conferences with Mr. Langworthy and with counsel for Mr. Factor with respect to various questions, which I am not including, however, in this statement.

[fol. 126] The above time includes conferences with Mr. Overmyer in regard to the petition which he had prepared for Mr. Pepys to intervene in the litigation here in case the

latter should decide to do so. It includes the conferences in re search made by Mr. Overmyer upon the doctrine of "clean hands" so far as the same pertained to the motion of the Receiver of the Broad Street Press in case he should intervene. It includes conferences in re authorities we had collected with respect to the right of the Receiver to sue in the Federal Court here. It includes conferences in re facts shown by the various affidavits and statements furnished to us by Mr. Overmyer. It includes likewise conferences in re interviews which Mr. Overmyer had had with Mr. Levinson and a conference in January 1932 looking to the co-operation of the Liquidator and Mr. Overmyer, his solicitor, in carrying the litigation to a successful conclusion.

It does not include services rendered by the members of the firm of Wordsworth, Marr, Johnson & Shaw in the premises. An itemized statement of such services will be furnished as soon as it reaches my hands. Generally, however, such time includes conferences with Mr. Lee and Mr. Pepys in July and September 1931, a somewhat extended correspondence with the persons who thereafter intervened and interviews with their solicitors. It includes also daily conferences between Mr. Ralph Wordsworth and Mr. Ferry with us during the period from June 6, 1932 to July 19th of the same year. The statement of Mr. McConnell with respect to his time is attached hereto. In general, except for the time that I was in Europe in 1931, he was engaged in the same work upon the Factor case as I was.

For the convenience of counsel I am attaching herewith a copy of the docket entries in this cause in the Federal Court.

John H. S. Lee.

[fol. 127] The names and addresses of the persons who have performed legal services are:

Thomas C. McConnell, 1304 Harris Trust Building, Chicago;

Franklin R. Overmyer, First National Bank Building, Chicago;

Edward H. Lockwood, 29 Broadway, New York City;

Members and Employes of the firm of Wordsworth, Marr, Johnson & Shaw, London, England.

I have likewise paid as out-of-pocket expenses to:

Cyrus B. Austin, 100 E. 42nd Street, New York City	$130.00
Haight, Mathes & Sheppard, Los Angeles, California	50.00
Aylesworth, Garden, Thompson & Stuart, Toronto, Canada	25.00
Hogg & Hogg, Ottawa, Canada	15.00
Howard W. Jennings, St. Louis, Mo.	25.00
Miller & Chevalier, Washington, D. C.	25.70

[fol. 128] Docket Entries in Factor Case

5/20/31.	Filed Bill of Complaint and copy.
" " "	Order Bill suppressed for service. (Wilkerson, J.)
" " "	Issued Process and copies.
5/21/31.	Filed Amendment to Bill and copies.
" " "	Leave to plaintiff to file amendment to Bill instanter and that subpœna issue. Further ordered Amended Bill be suppressed pending service. (Wilkerson, J.)
" " "	Issued Process and copies.
" " "	Appearance of National Bank of Republic.
5/22/31.	Leave to withdraw copy of Bill.
5/22/31.	Subpœna returned served as to Union Bank and J. Factor.
5/26/31.	Subpœna returned served as to Foreman Bank.
5/28/31.	Appearance of Union Bank of Chicago.
6/ 8/31.	Filed motions to dismiss for all defendants.
6/ 9/31.	Motion to dismiss by First Union Trust and Savings Bank.
7/ 7/31.	Motion to file Amended Bill allowed and rule on defendants to answer by September 1st. Further ordered that writ of Subpœna issue. (Woodward, J.)
" " "	Filed Amended Bill of Complaint.
7/ 8/31.	Issued Process and copies.
7/30/31.	Appearance and motion to dismiss of John Factor, Schwartz and Rella Factor.
8/ 4/31.	Filed Answer of Central Republic Bank.

8/21/31. Filed Process returned served as to Central Trust Company, Rella Factor and Arthur Schwartz.

8/25/31. Filed Notice.

" " " Motion for appointment of Receiver continued to September 4, 1931. (Lindley, J.)

8/26/31. Filed Answer, and copy of Union Bank of Chicago.

8/29/31. Filed Motion and copy of First Union Trust and Savings Bank to dismiss.

9/ 3/31. Filed Additional Grounds in support of motion to Dismiss and Affidavit.

9/ 4/31. Filed Notice.

[fol. 129]

9/ 4/31. Motion to dismiss bill set for Sept. 8th; to be re-set. Leave to file withdrawal of Amberg, etc. as solicitors for defendant First Union Trust and Savings Bank. Filed withdrawal and substitution of Burry, Johnstone, Peters & Dixon.

9/ 8/31. Motion to dismiss bill continued to Sept. 10, 1931, before Judge Wilkerson.

9/10/31. Cause set for trial October 1st on question of Jurisdiction.

9/21/31. Rule on defendants to file security for costs.

9/22/31. Filed security for costs.

9/29/31. Filed Notice. Order that subpoena duces tecum issue. Motion for leave to file verification of bill entered and continued to date of hearing. (Wilkerson, J.)

9/30/31. Issued subpoena duces tecum.

10/ 1/31. Motion to dismiss on Grounds 13 and 14 for want of jurisdiction overruled. Motion to dismiss on other grounds set for hearing October 26th. Order granting Jacob Factor sixty days for Statement of Evidence.

10/ 6/31. Filed subpoena duces tecum return executed.

10/19/31. Filed Notice. Motion for leave to file Intervening Petition; John Marsden Farrington entered and continued to October 26. (Wilkerson, J.)

" " " Filed Notice.

10/26/31. Motion to dismiss motion to John Marsden Farrington et al. for leave to file intervening petition set for hearing November 9th. (Wilkerson, J.)

11/ 9/31. Motion to dismiss and motion for leave to file intervening petition continued to November 12th. (Wilkerson, J.)

11/12/31. Motion to dismiss and motion for leave to file intervening petition on hearing. (Wilkerson, J.)

11/13/31. Arguments heard and continued to November 16th, 10:00 A. M. for further hearing. (Wilkerson, J.)

11/16/31. Arguments heard and continued to November 17th for further hearing. (Wilkerson, J.)

11/12/31. Filed Amended Bills of Complaint with Affidavits.

11/17/31. Arguments heard and motion to dismiss and motion to intervene taken under advisement. (Wilkerson, J.)

[fol. 130]

2/ 4/32. Motion to dismiss overruled. Rule on defendants to answer within twenty days. Motion for leave to file intervening petition allowed and rule on all parties to answer within twenty days. (Wilkerson, J.)

2/23/32. Filed motion to rehear. Motion to rehear and re-considered continued to February 25th. (Wilkerson, J.)

2/25/32. Filed appearance of additional counsel for defendant.

" " " Leave given defendants to file affidavits presented in support of motion to rehear and reconsider allowed. Objections entered and overruled. Arguments heard and motion to rehear and re-consider continued to February 26th. (Woodward, J.)

2/26/32. Filed Affidavits in support of motion to rehear.

2/27/32. Arguments heard and Briefs submitted, and motion taken under advisement. (Woodward, J.)

3/ 5/32. Filed Opinion. (Woodward, J.)
Motion for rehearing denied.

" " " Order allowing exceptions. Certificate of Evidence to be presented by April 4th. (Woodward, J.)

" " " Motion for leave to file objections. Filed nunc pro tunc as of February 23rd allowed.
Filed motion of Arthur L. Schwartz to dismiss.
Filed motion of Foreman-State Trust and Savings Bank to dismiss. Leave given to file motion to dismiss bill; plaintiffs to have until March 16th to object or plead to petition. (Woodward, J.)

" " " Order time for all defendants to answer extended to April 4th. (Woodward, J.)

3/12/32. Filed motion and Affidavit. Hearing on motion of complainants to strike from files Motion to Dismiss. (Woodward, J.)

3/23/32. Filed reference to additional affidavits by certain defendants and copies. Filed additional affidavits in support of motion of Schwartz to dismiss.

3/25/32. Motion for issuance of subpœna duces tecum for C. A. Palmer denied. (Woodward, J.)
Motion to file limited Answer to Amended Bill denied. (Woodward, J.)
Motion to dismiss denied.
Motion to strike allowed.

[fol. 131] Defendants' Exceptions and thirty days to file Statement of Evidence. (Woodward, J.)

4/ 4/32. Filed Answer and copies of defendants to Second Amended Bill.

4/11/32. Order on stipulation dismissing suit as to Central Republic Bank. (Carpenter, J.)

4/18/32. Filed motion to extend time to answer and to file Statement of Evidence.

4/30/32. Arguments heard on motion for leave to take depositions in Paris, France. Hearing May 7th.
Arguments heard on motion for leave to take depositions in London, England, continued to May 7th.

Arguments heard on motion for leave to take depositions in New York. Continued for further hearing to May 7th. (Woodward, J.)
Motion of plaintiffs to strike certain allegations from Answer continued to May 7th.
Defendants First and Second Statement of Evidence presented.

5/ 7/32. Motion of defendant to take depositions entered and continued to May 14th. (Woodward, J.)

4/30/32. Filed motion to strike portions of Answer.
Filed Notice and Petition for leave to take depositions and issue subpoena duces tecum.
Filed objections in re depositions.

4/30/32. Filed objections defendants taking depositions of Edward H. Lockwood.
Filed Notice and Petition of plaintiffs and intervenors to take depositions.

5/14/32. Filed Notice and Motion to strike.
Filed objections of defendants to petition for leave to take depositions in France, England and New York. (Woodward, J.)
Motion to take depositions in Chicago and for subpoena duces tecum to May 21, 1932.
Filed Supplemental Petition and Supplemental Affidavit of plaintiffs and intervenors.
Motion to strike certain parts of Answer entered and continued to May 21st.

[fol. 132] Motion heard and granted, and objection to taking depositions in New York to stand as motion to suppress Notice to take depositions in New York. (Woodward, J.)

5/21/32. Filed petition of defendants in re leave to defendants to take depositions in France and England. Leave to take depositions in New York granted. Leave to take depositions in London, and Paris, France, granted. (Woodward, J.)
Motion for leave to take depositions in Chicago and for subpoena duces tecum denied.
Motion to strike from answer certain allegations to be taken up on thirty days notice.

6/ 2/32. Order entered amending order of May 21st re depositions taken in Paris, France. (Woodward, J.)

6/ 3/32. Issued dedimus to London, England, and to Paris, France.

7/25/32. Filed Notice. Leave to Hyman R. Glick, Receiver of Edwin Hult & Company, to file intervening petition instanter, and rule on all parties interested to answer in ten days. Filed intervening petition Hyman R. Glick. (Lindley, J.)

8/ 9/32. Filed Notice..

" " " Motion to strike from files petition of Hyman R. Glick.

8/22/32. Motion for entry of decree continued to September 19th.

Motion to strike intervening petition set for September 19th.

8/26/32. Filed motion of plaintiffs and intervenors and defendant John Factor.

" " " Entered order of publication giving notice to parties claiming any right to fund involved to make application to intervene before September 19th. (Lindley, J.)

[fol. 133] Mr. Healy:

Q. This statement also shows the names of the attorneys who were associated in this matter, representing the plaintiffs and the intervening petitioners.

A. Yes, all except Tamplin & Company and another attorney whose services I cannot prove, and who I am compensating out of anything I get.

Q. And it also shows a list of the docket entries made in the case, beginning May 21, 1931, and ending August 26, 1931.

A. I meant, if the Court please, when I cite that time, not the times when I would come in on a motion. I meant actual argument, where we occupied a day. We were in on various motions from time to time.

The Court: You could charge for that, the time you were sitting around, sometimes a half a day.

A. Well, there was time spent that way, necessarily I cannot tell you what part.

The Court: I know you were in court a good many times.

A. I was in a good many times, as the docket will show, but I am referring only to where I used up a day of continuous argument.

The Court: Oh, yes.

Mr. Healy: Do you want to supplement or add to that in [fol. 134] any way?

The Court: What I had in mind, I remember a time when you were in here two or three times a week.

A. I was.

The Court: On a motion of one kind or another, I would keep you here for an hour or two in the morning.

A. I did not include those.

Mr. Healy:

Q. Do you want to supplement in any way the services which Mr. Wordsworth and his firm gave in this matter?

A. May I add one word as to my work? By actual count, I spent from May 30th on eighty percent of my time on this case. I had no intentions of spending that much, but I did. I have also spent a good deal of time since I got back which I have not included in that statement.

Q. Then about how much time did Mr. McConnell, under your direction, give to this matter?

A. Oh, he spent—he was with me working on it continuously, practically, I think, wholly, except I can only say from information how much time he spent while I was in Europe. I think he spent practically all of his time. He was very active.

Q. This is a statement of Mr. McConnell's services in the matter?

A. Yes.

Q. Which was given to Mr. Langworthy.

A. Yes.

Q. So far as you know, that is correct and accurate?

[fol. 135] A. Yes. I looked it over, and I believe it is correct, excepting I have only his statement to me as to what he did while I was away.

Mr. Healy: I will have him supplement that, but in the meantime I will ask to have this marked Lee Exhibit D.

(Said document was thereupon marked "Lee Exhibit D" and was thereupon offered and received in evidence and is in words and figures as follows, to-wit:)

[fol. 136] LEE EXHIBIT "D"

Statement of Thomas C. McConnell

To July 7, 1931.—To looking up law and preparation and filing of original Bill of Complaint and amendments thereto, issuance of process and arranging for service of same; to interviews, gathering facts from various sources, and analysis of such facts; to looking up law and preparation of Second Amended Bill of Complaint; to reading and analysis of Guild Hall depositions; to filing and issuance of process; to attendance in Court upon the filing of the Second Amended Bill of Complaint ..... 27 days

July 8, 1931, to July 17, 1931.—To trip to New York re investigation transfer of funds London through New York to Chicago; to interviews with Edward H. Lockwood, Attorney; interview with George B. Medalie, United States District Attorney in New York; interviews with Brown Shipley & Company and Henry Hentz & Company in New York; interviews with Cyrus B. Austin, local Attorney ..... 7 days

July 21, 1931, to August 24, 1931.—To further investigation in Chicago, tracing funds from New York banks to Chicago banks; to investigation of attempt of a Mr. Hawkins to start a separate proceeding in bankruptcy; to analysis of additional Guild Hall depositions; to looking up law re status of independent bankruptcy proceedings; to conferences re Hawkins investigation; to looking up law re appointment of Receiver of funds in hands of banks; to looking up law re necessity of verification of Amended Bill of Complaint by parties, and other legal questions; to preparation for argument and motion for Re-

ceiver; to preparation and service of motion, petition, affidavits and notices of motion for appointment of Receiver ..... 9 days

August 25, 1931, to September 17, 1931.—To appearance in court before his Honor Judge Lindley on motion for Receiver; to preparation of additional affidavits; to looking up law re legal questions involved in pending motion and in motion to dismiss; looking up law re necessity of verifying bill of complaint; to examination of pleadings; to conferences re investigation of Factor citizenship; to examination of additional grounds to dismiss; to appearance before his Honor Judge Barnes on motion to dismiss; to examination of court files in Circuit Court, Superior Court, Probate Court, Federal District Court and Naturalization files, re proof Factor citizenship; appearance before his Honor Judge Wilkerson on motion to dismiss; to examination of Birth and Marriage records; to examination of Federal Court records in Florida Land Company case; to correspondence with William C. [fol. 137] Mathes, Los Angeles, California, Cyrus B. Austin, New York City, Howard Jennings, St. Louis, Missouri, Homer Hendricks, Washington, D. C., in re investigation of Factor citizenship; to investigation of records of Departments of Registration and Education, and Military records, re Factor citizenship; to correspondence with Toronto, Canada; to cables to Lee advising as to status; to correspondence with Secretary of State re passport investigation; to examination of Immigration and Deportation files ..... 20 days

September 18, 1931, to October 1, 1931.—Reading and analyzing reports on investigations conducted at Los Angeles, California, St. Louis, Missouri, Toronto, Canada, Washington, D. C., New York City, New York, re Factor citizenship; to examining law with reference to admissibility of evidence re Factor citizenship; to investigation of Naturalization records and record

of deportation hearing; to examination of law re pending motion to dismiss; to appearance in court re Cost Bond and arranging for filing same; to investigation of records of Better Business Bureau and Postal Department files; to cables and reports re hotel entries in Paris, France; to appearance in court and obtaining issuance of subpœnas duces tecum for defendant banks, and service of same ..... 9 days

October 1, 1931, to January 1, 1932.—To hearing before his Honor Judge Wilkerson on motion to dismiss on Grounds 13 and 14; to correspondence with corresponding attorneys investigating Factor citizenship; to preparation for argument of motion to dismiss on other grounds; to preparation of proofs of claim and analyzing same, of intervenors, and preparation of intervening petition; to preparing brief for oral argument on pending motion; to preparation of notices and appearing in court to file intervening petitions; to analysis of testimony *of testimony* taken in Spellen trial; to appearance before his Honor Judge Wilkerson on motion to intervene; to appearance before his Honor Judge Wilkerson on motion to dismiss and assisting in the argument of the same November 12, 13, 16 and 17; to further examination of analysis of law submitted by counsel for defendants in their printed briefs; to looking up law in preparation of a brief in support of plaintiffs' oral argument; to conferences in re settlement proposals; to looking up law re questions of evidence ..... 49 days

[fol. 138] January 1, 1932, to March 5, 1932.—To further investigation in Los Angeles and Canada in re Factor citizenship; to looking up law with reference to right of defendants to rehear question of citizenship; to examining motion supporting affidavits of defendants for rehearing on question of citizenship; to appearance before his Honor Judge Woodward on hearing of motion for rehearing; to analysis of authorities submitted by defendants; counsel in support of said

motion, and preparation and presentation of authorities in opposition thereto ..... 15 days

March 5, 1932, to March 25, 1932.—To examination of renewed motion to dismiss the bill filed by Schwartz and defendant Banks; to looking up law with reference thereto; to preparation of motion to strike and notices; to preparing brief in support of said motion to strike; to appearance in court before his Honor Judge Woodward; to examining additional affidavits and investigating the facts therein contained; to appearing with Lee resisting motion for issuance of subpœna duces tecum; to resisting motion to file a limited answer and to procuring a rule on the defendants to answer the Second Amended Bill ..... 17 days

March 26, 1932, to May 31, 1932.—To examination of Federal Statutes, looking up law as to taking depositions; to further examination of facts as a basis for a petition to take depositions; to preparation of such petitions to take depositions in Chicago, New York, London and Paris; to the preparation of affidavits in support of said petition; to analyzing and looking up law with reference to objections filed by defendants thereto; to appearance and argument before his Honor Judge Woodward on May 21, 22, 23 and 24 in reference to said motions; to preparation of motion to strike defendants' answers; to issuance of Dedimus and Letters Rogatory to take depositions in London, England, Paris, France, and New York City; to examination of witnesses and documentary evidence at Henry Hentz & Company and Brown Shipley & Company in New York City and arranging for the taking of depositions in that city; to checking information with reference to transfer of funds from New York to Chicago, both in New York City and in Chicago, and obtaining photostatic copies of such documentary evidence ..... 26 days

June 1, 1932, to June 6, 1932.—To examination of affidavits, depositions and other documentary evidence, and conferences with Lee re same .... 6 days

[fol. 139] June 6, 1932, to June 10, 1932.—To investigating records in Paris, France, of Henry Hentz & Company and records at Hotel Registers and Prefecture de Police in Paris, France, re tracing funds and citizenship; to arranging for taking depositions in Paris, with United States Consul; to interviewing other witnesses and collecting facts ..... 4 days

June 10, 1932, to July 27, 1932.—To interviewing witnesses, collecting facts, inspecting records, suppœnaing witnesses; to numerous conferences with Wordsworth and Lee; to examining witnesses on the stand (such testimony appearing in the depositions on file herein); to supplemental conferences with Gilbert, Carter, Pepys, Lee, Wordsworth and Dr. Clark; to assisting in preparation of settlement agreements and proposed decree and letters to be sent out to clients; to arranging for return of depositions to the District Court; to checking over records of clients and their consents to settlement ..... 47 days

To time traveling on return to office ..... 8 days

Total ..... 244 days

[fol. 140] Q. And this statement shows that Mr. McConnell rendered the services in this matter beginning in July, 1931, until July, 1933, and his time was occupied for a period of 244 days?

A. I think that that was correct.

Q. He was abroad with you when you were taking these depositions.

A. All the time. I hoped to have one of us start back a good deal earlier than we did, but when we go there, it was all two men could do, together with the help we had from Mr. Wordsworth's firm and Mr. Tamplin's firm.

Q. As a practising lawyer at this bar, Mr. Lee, do you know the usual, customary, fair and reasonable charges made by solicitors in chancery for services such as were rendered by you, when such seevices are on a contingent basis?

A. I do in this sort of a matter.

Q. And in your opinion, as a practicing lawyer, what is the usual, customary, fair and reasonable value of such services on a contingent fee basis?

A. It would be one-third. It is frequently a little higher.

Q. Do you want to take any position before the Court [fol. 141] now——

A. Surely.

Q. (Continuing:) —with reference to the amount of the fee?

A. Surely, yes.

Q. That you would be willing to accept?

A. Surely, while I refused to make any agreement with regard to what I would ask for, and while the other parties to the conference were not bound, neither was I, I am not going to ask for more than was suggested in that conference, namely, twenty percent. I think twenty percent, considering all the facts, would be a modest compensation, and it would be perfectly acceptable to me.

Q. And out of that amount of fee allowed by the Court, you are to defray or you are to pay to these legal associates of yours in the case the various amounts or parts agreed upon?

A. Yes.

Q. Mr. McConnell, Mr. Wordsworth, and Mr. Overmyer?

A. Yes.

Q. Did you want to add anything? Were there some briefs you wanted to call the Court's attention to, that [fol. 142] have not been referred to as yet?

A. I think not, unless the Court would like to have before him these briefs that were filed—used by the other counsel. I don't know whether he would care to see that.

Q. Mr. Lee, was there some effort made to settle this case before the final settlement was brought about, on a lesser basis, and which over-all settlement at that time was opposed by you, but acceptable to the liquidator, or is that a matter that you want to call the Court's attention to?

A. Oh, I am not particular about that. If the opposing counsel wants to go into that, I will be glad to.

The Court: It is not highly material, is it?

Mr. Healy: Beg pardon?

The Court: I say, it is not highly material, is it?

Mr. Healy: Oh no, except that it indicates, if your Honor please, that Mr. Lee, through his efforts, secured for his client a better settlement.

The Court: But the liquidator is not a witness here.

Mr. Healy: No, no.

The Court: And really, we are not concerned with him. We are concerned with the people he represents.

Mr. Healy: Well, it is here before the Court.

The Court: Well, he is representing the creditors who [fol. 143] are entitled to the money. He is not present in person.

The Witness: Not at all.

The Court: I don't think it would affect his clients one way or the other, who are entitled to the money.

Mr. Gilbert: You mean, entitled in the sense under the settlement? Entitled under the settlement?

The Court: Oh, yes.

Mr. Healy:

Q. And your agreement, Mr. Lee, so far as your fee is concerned, requires you to participate, to an extent, in the mortgages which are a part of the settlement?

A. Oh, Yes. I agreed—they suggested it would be only fair for me to take my share of any mortgages, and I said certainly it would, and in pro rata. Mr. McConnell agrees to the same thing with me.

The Court:

Q. That is to say, the fee is to be awarded partly in cash, and partly in notes?

Mr. Gilbert: Three-thirteenths in notes, secured by mortgages selected, and the remaining ten-thirteenths in cash.

The Witness: That is correct.

The Court:

Q. On that basis, you want $200,000.00 in money and $60,000,000 in these notes.

A. That is right.

Mr. Healy:

Q. Unless you have something else to suggest to the Court, [fol. 144] Mr. Lee, I think that's all.

A. Well, only this: That when Mr. Overmyer found that he could not go to Europe and help us take these depositions, or take part in them, he offered—I had to take Mr. McConnell with me, and it put us out of commission here, really, for a considerable period, and he agreed to pay Mr. McConnell a little less than eight percent of anything he received.

Q. That is an arrangement between Overmyer and McConnell?

A. Yes, between Overmyer and McConnell, through me.

Q. Yes. You are not to participate in that in any way at all?

A. Not directly or indirectly.

Mr. Healy: That's all.

The Court: As I understand it, the award was made to Mr. Lee.

Mr. Healy: Yes, your Honor.

Mr. Langworthy: No, the award is to be made to the plaintiffs and intervenors, but the money is to be paid to Mr. Lee.

The Court: The money is to be paid to Mr. Lee.

Mr. Langworthy: Yes, that is right.

The Witness: Yes.

The Court: Why I am asking that, are we concerned at this hearing with the manner in which Mr. Lee derives this money, or is the sole question before the Court to [fol. 145] be passed upon here the reasonable value of these services?

Mr. Healy: Yes, sir.

The Court: In the aggregate, which were rendered in this case?

Mr. Healy: Yes, sir.

The Court: Without trying to apportion it.

Mr. Healy: No, the Court won't be concerned with the division between the parties.

The Court: Are we concerned here with how much Mr. Wordsworth earned, or how much Mr. Overmyer earned, or how much Mr. McConnell earned?

Mr. Healy: No, except to show, if your Honor please, that Mr. Lee is not receiving, ultimately, all of the fee.

The Court: Except that we might arrive at the total amount in this case by adding up these different amounts but, after all, we have here a service that has been ren-

dered by one chief counsel, who has a number of associates, and clerks, and others who were collaborating with him in the work. I suppose the single question to be ascertained here is what were these services as rendered by Mr. Lee as chief counsel worth, assisted as he was, of course. Every lawyer who goes into a court room to try a case takes a corps of clerks with him. When it comes to fees. He is [fol. 146] paid the fee. He is supposed to be equipped to conduct the work.

The Witness: May I make one suggestion, your Honor? I don't think Mr. McConnell is a clerk.

The Court: Oh, I didn't intend to say he was.

A. I understand.

The Court: I didn't intend any such implication, because I know he has contributed a very great deal to this case.

A. I am the chief counsel, but I am sure that I could not have carried through these depositions successfully as I did unless I had had the assistance of a man of Mr. Wordsworth's quality and standing, and Mr. Perry there in London. I don't want to detract from their work, because I appreciate it, I would have been without the ability to have made the showing that we made there that I believe resulted in the settlement, unless I had had his active cooperation, and that of his office.

The Court: Well, what I was trying to get at was this: This question of fees is one that arises frequently in the courts here.

A. Yes, I understand.

The Court: We deal with very substantial fees sometimes. Now, as a rule when application is made for the [fol. 147] allowance of a fee in a case, when the Court allows fifty or seventy-five or a hundred thousand dollars to a lawyer or to a law firm, we don't try to divide it up into twenty-five or fifty different pieces, to find out how much each one in that man's firm or in that man's office had contributed to it. We fix the fee as a unit. I suppose that is what you have got here, isn't it?

Mr. Gilbert: The award is all to be made to Mr. Lee, but I suppose what the different people did goes into the consideration in his fee.

The Court: Sure. But if we should arrive at the conclusion that he himself earned more than he is asking for him-

self and his associates, I suppose it wouldn't make much difference, would it?

Mr. Gilbert: No, if he had ——

The Court: I say, taking that extreme view, suppose we would arrive at that conclusion.

Mr. Gilbert: Or, on the other hand, if you arrived at the conclusion that his services were worth one-tenth what he was asking, then you might want to add another tenth for what the others did.

Mr. Langworthy: The language of the contract is "Such attorneys' fees to include, upon proper proof, all such legal services as had been rendered to Mr. Lee, and which Mr. [fol. 148] Lee has obligated himself to pay."

I take it that is the reason why he went into this proof.

The Court: Yes. I had forgotten that.

Mr. Healy: Then you may examine Mr. Lee, if you desire.

Mr. Gilbert: May we interrupt the examination before we start on the cross examination, Mr. Langworthy?

Mr. Kearns: The subpœna that your Honor issued a short while ago has been served on the two minor children. Petition by the two trustees, duly verified, was filed by myself. That is a draft order. I think Mr. Gilbert has a suggestion as to the guardian ad litem.

Mr. Gilbert: I have discussed with all the parties informally the selection of a guardian ad litem, and they all have agreed that Mr. Fischel, who has no connection with this litigation, in any form or with any of the parties at all, will be proper.

The Court: Fisher?

Mr. Gilbert: Mr. Fischel, of Fischel, Kahn, Hart and Epstein.

The Court: Yes. Very well. Enter the order.

[fol. 149] Cross-examination.

By Mr. Langworthy:

Q. Mr. Lee, the document I show you is the document you referred to as having been sent out, and was signed by the petitioner—the intervening petitioners in this case?

A. It is.

Mr. Langworthy: May we have this marked as an exhibit in the case?

Mr. Healy: Which paper is that?
Mr. Gilbert: Pepy's Exhibit 1.
Mr. Langworthy: Pepy's Exhibit 1.

(Which said document, so offered and received in evidence was marked "Pepy's Exhibit 1", and the same is, in words and figures following, to-wit:)

[fol. 150] PEPY'S EXHIBIT 1

August 1931.

John H. S. Lee, Esq., % Messrs. Wordsworth, Marr Johnson & Shaw, 39 Lombard Street, London, E. C. 3.

DEAR SIR:

In the District Court of the United States for the Northern District of Illinois, Eastern Division. Arthur Traviss Faber and Adah Hayhurst, Plaintiffs, vs. Foreman-State Trust and Savings Bank, a corporation, et al., defendants

I hereby authorize you to include me as a party Plaintiff, or as an intervening petitioner in or as otherwise supporting the above proceedings, or any other proceedings which you may consider it desirable to institute against Factor or his fellow-conspirators, upon the following terms:

1. That I am not to be liable in any event to make any contribution out of my own pocket towards the costs, charges and expenses of the above proceedings, or any of them, other than a contribution of a penny in the pound on my claim, which amounts to £ —.

2. That you will look for remuneration for your services only to any funds which may be recovered in such proceedings.

3. That out of any funds to be recovered in such proceedings you are to be paid in respect of your remuneration the sum or sums which may be allowed by the Court to the Plaintiffs in such proceedings as attorney's fee, or which the Court may think a reasonable fee for your services, taking into consideration the services so rendered and the funds recovered, and

4. That I will not make any settlement of my claim without your consent.

As requested in Messrs. Wordsworth, Marr Johnson & Shaw's letter to me of the 26th instant, I enclose in their favour £ —, being a penny in the pound on the amount of my claim, and should like a formal acknowledgment.

Yours faithfully, —— ——.

Please sign in full.

[fol. 151] Mr. Langworthy:

Q. You stated that you had one day's argument before Judge Wilkerson on the first hearing on the motion to dismiss?

A. That is correct.

Q. And four days' argument on the second motion to dismiss?

A. That is my best recollection, according to my docket, according to the docket here, too.

Q. Now, then, the next argument in court was before Judge Woodward on a motion for rehearing?

A. That is right.

Q. That took one or two days,

A. Two days, and maybe three; I think two.

Q. Then, the banks made a motion to dismiss, and there was an oral argument on that?

A. Yes.

Q. How many days?

A. Well, I would want to look at the docket a day or two.

Q. Then, there was another motion made, was there, to dismiss, and argument in court, or was there?

A. No. You have referred, now, to two motions, or haven't you?

Q. Yes. I referred to three——

A. Yes.

Q. (Continuing:) —oral arguments?

[fol. 152] A. That is right.

Q. One, two, four?

A. There was further argument.

Q. Four oral arguments in court?

A. There was further oral argument on the question of the right on the part of the defendant to file a limited answer.

Q. And how long an argument?

A. Oh, some of that didn't take long. We argued it for maybe two hours or so, two or three hours.

Q. A half a day?

A. Maybe.

Q. Then, there was an oral argument on the question of taking depositions?

A. Yes. That was three or four days.

Q. Beg pardon?

A. Three or four days. The docket will show you exactly, I think, there, the court docket.

Q. And that is the extent of the appearances in court, except for the various and numerous motions?

A. Oh, there were numerous motions, yes.

Q. Except for the numerous motions?

A. That is right. There was a motion on the part of the intervening petitioners to intervene, but that might be included under the heading "various motions"; you will see [fol. 153] by the docket there, there were a great many motions.

Q. Now, how long did you have this matter in charge prior to May 20th, the date that the bill was filed?

A. A very short time.

Q. A week?

A. Oh, no, less than a week, I think.

Q. Was it less than a day?

A. No, no. I think it was several days. I can't tell you.

Q. Now, the bill was filed on behalf of Arthur Travis Faber, am I right about that?

A. Yes, that is correct.

Q. And from whom did you get your directions to file the bill for Arthur Travis Faber?

Mr. Healy: I don't think we are concerned with that, if your Honor please. I don't know that anybody has questioned Mr. Lee's right.

Mr. Langworthy: I am not questioning it. I am just asking the question.

Mr. Healy: What difference does that make?

Mr. Langworthy: Preliminary.

The Court: Let me hear the question.

(Last question read by the reporter.)

Mr. Healy: The only question here is the question of the [fol. 154] amount of Mr. Lee's fee.

Mr. Langworthy: That is right.

Mr. Healy: What his arrangements with his clients were, or with whom he talked, or not.

Mr. Langworthy: I think his arrangements with his clients are very material. That is just the point.

Mr. Healy: I have not any objection to your going into that.

Mr. Langworthy: That is what I was going to do. I want to know who he had his arrangements with.

A. I had it with Tamplin and Company.

The Court: Tamplin Company?

A. Tamplin & Company. It is a law firm composed of a number of men whose firm name is Tamplin & Co., C-o.

Mr. Langworthy:

Q. They are a firm of solicitors of London?

A. A well-known firm of solicitors.

Q. And those directions, I suppose, came by cable, or by letter?

A. The first, to my best recollection, came by cable—no, I mean, came by oral conversation over the cable, the phone.

Q. Over the phone. Now, was any arrangement made at that time between you and Tamplin & Company as to compensation?

A. Only that they did not want any charge made. They [fol. 155] said—I will give you my best recollection—they said that Mr. Faber had incurred a large amount of costs in the case already, that he was a minister, with little or no means, that they did not want to have a charge against him unless they are successful. That the question of court costs was different, but, as to solicitors' fees, they wanted the understanding, asked me if I could handle the matter on a contingent basis.

Q. Well, that original bill was a class suit, wasn't it?

A. It was.

Q. And did they inform you that there were large classes that were in the same situation as Mr. Faber?

A. They informed me that a lot of people had been defrauded under this plan.

Q. Now, did you, by that same means of telephone, get the facts which you set up in the bill at that time?

A. I got it from various sources.

Q. Am I right in your not having any other client than the one until you went to London, in July?

A. Not except Mr. Faber and his wife, but she was not included in the original bill.

Q. Well, how did the Hayhurst plaintiff come in, and when?

A. Some time later. They had also a client by the name of Ada Hayhurst, Tamplin & Company, and wanted me to [fol. 156] insert her as a plaintiff.

Q. This provision in the contract of something over 5,000 pounds, that was paid to Tamplin & Company, is a payment to them for the full amount of the claims of Faber and wife, and Hayhurst, and their expenses?

A. No, no.

Q. No, I am wrong about that.

A. Yes. Mr. Faber's costs—of course, the costs in England, Mr. Langworthy, are very different from the costs here. Mr. Faber had conducted a long litigation over there, and I think his costs—I would not like to tell you how much they were. From my point of view, the solicitors' fees and everything were very heavy. This includes simply the original amount of the money that he had paid, apart from any costs and solicitors' fees.

Q. I don't know as I quite understand the last part of that. It includes only what these three people had paid to the Broad Street Press?

A. Mr. Faber didn't pay it to the Broad Street Press. Mrs. Hayhurst paid it to the Broad Street Press. Mr. Faber had paid it to someone else. It included, however, only the original amount, and did not include all the costs that they had been put to, and solicitors' fees, and whatnot. [fol. 157] Q. It did not include any solicitors' fees?

A. No.

Q. You were furnished with a certain—with certain documents and statements by Mr. Overmyer?

A. Yes, sir.

Q. Which you referred to?

A. Yes, sir.

Q. From which you prepared your second amended bill?

A. That was a part of the information.

Q. Yes.

A. A substantial part of the informationa originally. I got a considerable amount of further information, when in London.

Q. Yes.

A. And some information from different sources here.

Q. Yes.

A. In New York, and other places.

Q. Now, according to this settlement agreement, there is a statement of cash expenses to be presented to the court.

A. I told you this morning that I understand that Mr. Perry is on the boat coming over, and he has that.

Q. Oh, yes.

A. I thought this was going to trial next Monday, if the court please, but I told counsel that I would give it to them [fol. 158] as soon as Mr. Perry reached here. I haven't that statement. It is an itemized statement, if the court please, under the contract to be signed by Wordsworth. I can give you the items I have expended here, but he has handled most everything.

Q. And I take it that Mr. Perry will detail the services more in detail rendered by Wordsworth & Company, which are to be taken into consideration by the court?

A. He will if you want him to. If you want to delay the matter until he gets here, he will be very glad to do it. It is up to you.

Q. I don't want to delay it.

A. I can't give the court itemized information about the firm there. I know that they, in addition to what I have said, they carried on a voluminous correspondence with these various people that intervened, saw their attorneys, a number of them, interviewed them, and all that kind of thing. Now, I can not give you the hours and days. I know what time they spent while I was in London.

Q. Have you the copy of the letter that was mailed to the stockholders of the Rhodesia and Vulcan Companies, with which this Pepy's Exhibit 1 is concerned?

A. I haven't it here, but I will be glad to get it for you, [fol. 159] if you think it is material.

Q. Well, it explains this letter, doesn't it?

A. Yes.

Q. Can you explain, or is there any further statement that can be made with reference to the services of Mr. Overmyer, that are to be included in the award?

A. Well, I directly do not include anything in the award for Mr. Overmyer's services. He rendered very—outside of some conferences with me that covered maybe 6 or 8 days, or I mean, on occasions of 6 or 8 days, conferences with Mr. Levinson, and various of us, he rendered no services other than he rendered to the liquidator some services in preparing that intervening petition and looking up some law. I have not included any claim for services rendered by Mr. Overmyer in this statement, other than what I have said in the statement there of those conferences, if you want to include them. I have a copy here. Would you like to see it?

Q. I had some copies of it made. In the list of services, the persons who have performed services in the statement which has been offered in evidence, you have Edward H. Lockwood, Mr. Overmyer, Mr. McDonnell, and Wordsworth, Marr, Johnson and Shaw, besides some minor items I don't care to refer to?

A. Yes.

[fol. 160] Q. Now, what is there to be taken into consideration by the court by way of services performed by Mr. Lockwood?

A. Mr. Lockwood made an investigation for us in connection with the tracing of funds in New York, and also had conferences with Mr. McConnell. I asked him to send me a bill, and Mr. McConnell, I think, has the letter, saying that we could pay him anything that was reasonable. That is his reply. Is that right, Mr. McConnell? Mr. McConnell told that to me just as I was coming into court.

Q. What is your claim in dollars, then, on that account?

A. Oh, I should think a reasonable compensation to him,—he just looked up certain data, and had a conference, two or three hundred dollars, $300, I would say. He did no work except that.

Q. What salary, if any, did you pay Mr. McConnell?

Mr. Healy: Oh, I object, if your Honor please. Mr. McConnell is not in this matter on a salary basis. He is to get a part of Mr. Lee's fees, and Mr. Lee has testified how much that part is to be.

The Court: I don't see how that is material.

Mr. Langworthy: Perhaps I do not understand.

Q. You testified that you are to pay Mr. McConnell 8 per cent of your fee?

[fol. 161] The Court: I understand that Mr. McConnell, insofar as he has anything to do with this, at all, is to get 8 per cent of what Mr. Lee gets out of it, under his arrangement with the other lawyers. He is also to have 8 per cent of Mr. Overmyer's.

The Witness: A little less.

The Court: A little less?

A. I think it figures about 7 7/10 per cent.

The Court: That is Mr. McConnell's compensation, under the arrangement with Mr. Lee in this case?

Mr. Langworthy: Yes, I understand that is so, but I do not understand that is the basis on which your Honor would necessarily be limited to finding the value of Mr. McConnell's services.

The Court: I know; but I do not understand that Mr. McConnell, in addition to that, is on a salary basis, is he?

A. Yes, he is.

Mr. Langworthy:

Q. He does get a salary from Mr. Lee?

A. Yes.

Q. In addition to that?

A. Yes.

The Court:

Q. This is in addition to the salary?

A. That is the contingent part of his fee. I may add this: Mr. McConnell has an arrangement with me under [fol. 162] which he takes outside work. He represents some very substantial people. He had an offer to handle a good deal of foreclosure work here, they actually wanted to bring the cases in to him, but he was busy with this work, so busy that he could not do anything. I said, "Well, I will be glad to give you 8 per cent additional, or you name it." And there is how the arrangement was made. I paid him a regular compensation beside, and he takes his own work besides that.

Mr. Langworthy:

Q. The statement that reads "or 244 days' time," now, I didn't want to ask you any embarrassing questions, or any improper questions, but I thought what Mr. Lee paid

as salary, paid Mr. McConnell, might be material in the court's mind at arriving at a conclusion.

The Court:

Q. If he pays him a salary, in addition to what he paid him in this case, have you any objection to stating it?

A. Oh, no.

The Court: Go ahead and state it.

A. I pay him for such time as he uses for me $4800 a year.

The Court:

Q. In addition to that, he has his office, where he does his work, and a stenographer?

A. Oh, yes.

Q. His office stenographer?

Mr. Langworthy:

Q. An office stenographer?

[fol. 163] A. Yes, an office stenographer, and a telephone service, and so forth.

The Court:

Q. And the $4800 covers the work he does for you?

A. Yes.

Q. And, in addition, he is to be compensated by 8 per cent, in addition?

A. Yes.

Mr. Langworthy:

Q. And that 8 per cent will be figured on one-half of the award made by the court here?

A. That is figured on what I get personally.

[fol. 164] Q. You had some other business transacted between the 20th of May, 1931 and the 19th of July, didn't you?

A. Yes, I did.

Q. And you had some substantial business in addition to this during that period?

A. Yes, and I have turned down other substantial business. I used eighty (80) per cent of my time on this case, by actual count.

Q. Would you care to state to the Court your net income from your professional services for two or three years previous to the year 1931?

Mr. Healy: No, I object to that. I don't think we ought to go into that.

The Court: Sustained.

The Witness: I can tell you some of the cases I handled, if you want me to, and the amounts involved.

The Court: I should think it would be very difficult to state, to disclose your records with your clients in those cases. I suppose, though, lawyer's services are worth what they are worth, regardless of whether he is able to get any business or not. In these times he might not be hired on anything else, although he is capable of earning very large amounts, if he could get the work.

Mr. Langworthy: Yes, I understand that.

[fol. 165] The Court: There are a good many lawyers in New York used to make three or four hundred thousand dollars a year who are not earning quite that much now.

Mr. Langworthy:

Q. Was Mr. Clark present during negotiations between you and Mr. Pepys and Mr. Wordsworth and Mr. Carter and Mr. Gilbert?

A. He was not—Well, that is an ambiguous question. The negotiations were largely carried on by day, and frequently in the evening by Mr. Gilbert and Mr. Carter, and Mr. McConnell and myself. It was only when we as the result of a long series of negotiations, when we thought we were making some progress, that we got in touch with Mr. Pepys, and when any document was to be drawn up, or Mr. Pepys wanted to consult with his attorney, he would call in Dr. Clark.

Q. You made a statement in reference to Mr. Pepys, saying that he was willing to agree that you be allowed for fees in this case twenty per cent.

A. I don't think I put it that way. I thought I said that he said that he would have no objection to recommending that, and would be entirely satisfied with it.

Q. Didn't he say, Mr. Lee, that if what Mr. Stein had told him was true, that the courts were in the habit of allowing thirty-three and a third per cent to a half of the

recovery in this class of cases, that then he thought twenty [fol. 166] per cent would be reasonable.

A. What he said was that in arriving at that opinion he took into consideration what Mr. Sidney Stein had told him and what Mr. Levinson had hold him about what fees were on a contingent basis here.

Q. And he told you what they had told him, didn't he?

A. Yes.

Q. And that is substantially what I said?

A. Surely.

Mr. Langworthy: If your Honor please, other counsel, I understand, are going to cross-examine the witness, and I don't think I care to ask him any further, if they are.

The Court: Well, I desire to adjourn at this time. I have another matter. I desire to adjourn until tomorrow morning now. I have another matter. We will adjourn.

Mr. Carter: In view of your motions, may we make that at 1:15, your Honor?

The Court: It will not take very long tomorrow. We will be ready at 10:00 o'clock.

Mr. Carter: Very well, your Honor.

(Whereupon an adjournment was taken until 10:00 o'clock A. M. of the following day, being Thursday, September 22nd, A. D., 1932.)

[fol. 167]

FABER

vs.

FOREMAN

Before Judge Wilkerson

Thursday, September 22, 1932—
10:00 o'clock A. M.

Court met pursuant to adjournment.

Counsel present: As before.

The Court: Proceed with the hearing. Do you wish to cross examine further, Mr. Langworthy?

Mr. Langworthy: Yes. Surely. If your Honor please, counsel has produced, at my request, the letter of August

26, 1931, sent to the shareholders of the Vulcan Copper Mines, Ltd., and the Rhodesia Border Mines Corporation, Ltd., the beneficiaries of this fund, in connection with Pepys Exhibit 1, and I wish to offer it in evidence.

The Court: It is admitted, there being no objection.

Mr. Langworthy: As Pepys Exhibit 2.

(Which said document, so offered and received in evidence, was marked Pepys Exhibit 2, and the same is in the words and figures following, to wit:)

PEPYS' EXHIBIT 2

[fol. 168] Wordsworth, Marr Johnson & Shaw, 39 Lombard Street

R. Wordsworth, P. Marr Johnson

Telegraphic Address: "Amalgamate, Stock, London."
Tel. Nos.: Royal 3944 & 3945.
Agents in Cairo: Perrott, Russel & Fanner, 28, Sharia-el-Maghraby.

London, E. C. 3, 26th August, 1931.

DEAR SIR (or MADAM):

Re Broad Street Press, Ltd. (in Compulsory Liquidation)

We acted for the Petitioner upon whose Petition the Court made an Order winding up the above Company, and we are also representing the Official Receiver in his capacity of the Liquidator thereof, but we are not acting for the Official Receiver in relation to the subject-matter of this letter.

A man named Jacob Factor, who is now residing in Chicago, was the leading spirit in the frauds by which thousands of British subjects were induced through the medium of the above Company to invest moneys in Vulcan Copper Mines Limited and Rhodesia Border Mining Corporation Limited. It has been ascertained that Jacob Factor received approximately £700,000, as his share of the frauds, and there is good reason to believe that the greater part, if not the whole, of that sum is now represented by funds deposited in the name of Jacob Factor or his nominees in several Banks in Chicago.

Mr. John H. S. Lee, a well-known lawyer of Chicago, has already filed a Bill in the District Court of the United States for the Northern District of Illinois, on behalf of Arthur Traviss Faber and Adah Hayhurst, claiming that they were victims of the frauds and consequently interested in such funds, and the Bill has been so framed as to embrace all other persons who have been similarly defrauded. There appears to be no doubt that the proceedings are of great importance; and Mr. Lee has pointed out [fol. 169] that it would assist towards a successful issue of the proceedings that they should be supported by as many complainants as possible. It would be a sure indication to the Court of the widespread extent of, and of the havoc wrought by, the frauds complained of.

Mr. Lee has devoted a great deal of time to the matter, and has given it as his considered opinion that the proceedings are well founded, and that there is a reasonable prospect of their success. He has been good enough to say that he will look for his remuneration only to any funds recovered. Apart from Mr. Lee's remuneration, the only amount required will be to meet the Court fees and other out-of-pocket expenses, including the expenses of and relating to the evidence to be obtained from a large number of witnesses in this country. We cannot estimate exactly what will be required for this purpose, but we calculate that a penny in the pound on the amount of the claims would be sufficient. It is suggested that an account should be opened at the head office of Barclays Bank Limited in the joint names of Mr. Lee and our Mr. Wordsworth, and that all contributions should be paid into that account and utilised as and when required to meet the out-of-pocket expenses above referred to. The amount of your claim would be the actual sum paid for the shares you were induced to purchase in Vulcan Copper Mines Limited and/or Rhodesia Border Mining Corporation Limited. If the proceedings are successful, and you are one of the persons defrauded, we think you would be entitled to your proper share of the funds recovered. We anticipate that you will be only too pleased to learn that there is even a possibility of your recovering your money or any part thereof, and, if you would be willing to allow your name to be joined as one of the Plaintiffs in the proceedings, or to be otherwise associated with the same, on the footing that you would

not be liable to make any contribution towards the costs, charges and expenses of the proceedings, except to the extent above mentioned, we should be grateful if you would [fol. 170] complete and sign the enclosed form of authority (Nod. 1) addressed to Mr. Lee, and fill up the enclosed form (Nod. 2), with particulars of your claim, and return the documents to us completed in the accompanying envelope, together with a remittance made out in our favour for the amount of your contribution.

A report would be sent to you from time to time as to the progress of the proceedings, and an account rendered to you in respect of the expenses to which you would have contributed.

Awaiting your reply, we are,
Yours faithfully, Wordsworth, Marr Johnson & Shaw.

S. L. S. S.—CS13597B-14684.

[fol. 171] In the District Court of the United States for the Northern District of Illinois (Eastern Division)

"No. 2."

Arthur Traviss Faber and Adah Hayhurst, Plaintiffs,

vs.

Foreman-State Trust and Savings Bank, a Corporation; Foreman-State Corporation, a Corporation; First Union Trust and Savings Bank, a Corporation; Union Bank of Chicago, a Corporation; The Central Trust Company of Illinois, a Corporation; J. Factor, Louise Cohen, Rella Factor, née Cohen, and Arthur L. Schwartz, Defendants

Particulars

1. Name of claimant in full (surname first) (if female, state whether married, widow or spinster): ——.

2. Address: ——.

3. Occupation: ——.

4. Number of shares acquired in Vulcan Copper Mines Limited and the price paid for the same: ——.

5. Number of shares acquired in Rhodesia Border Mining Corporation Limited, and the price paid for the same: ——

6. Short particulars of any previous transactions which led up to the purchase of the above shares, especially particulars of any purchase and sale or purported purchase and sale of shares in any of the following companies: Triplex Safety Glass Company Limited, Edison Bell Company Limited, Guy Motors Limited, Swears & Wells Limited: ——.

S. L. S. S.-CS13596B-14688.

[fol. 172] JOHN H. S. LEE, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination (cont'd).

By Mr. Langworthy:

Q. Mr. Lee, you related the conversation you had with Mr. Wordsworth yesterday, in which you stated, in response to Mr.——

A. Just a little louder, will you please, Mr. Langworthy?

Q. In response to Mr. Wordsworth's suggestion about the division of the fees, you stated, "I will take fifty percent, and you and Mr. Overmyer can divide up the other fifty percent." Now, you stated you made no agreement at that time.

A. No. I said that would be aceptable to me.

Q. Yes, but there was no agreement arrived at.

A. No, we didn't come to—we didn't reduce it to writing, or we didn't come to an agreement. It was to be taken up, as I understood it, between them, and they were to agree about the matter.

Q. And it was afterwards taken up?

A. Surely. The final thing was in the contract of January, 1932.

Q. Yes. Well, now, you stated in that connection that Mr. Overmyer hoped to get through with the extradition [fol. 173] proceedings in which he would assist over here, and Wordsworth would be very valuable over there.

A. Yes, I told him——

Q. Yes. That is the answer. Now, what transpired, if anything, between then and January, when the agreement was put in writing, that prompted that division that is made in that agreement?

A. I had a conference with Mr. Overmyer, [illegible]me to my office. Well, there were several things transpired.

Q. But the agreement was made with the expectation, I take it, that Mr. Overmyer would be active in the litigation over here after he got through with the extradition proceedings?

A. Yes, and he said he would do what he could anyhow, but he said he was very busy in that, and he could do more when that was through.

Q. Well then, the purpose of making the agreement with Overmyer for the thirty percent was that he would assist in the litigation subsequently, which has not taken place. Am I right about that?

A. No, I wouldn't state it that way. Overmyer had introduced me to Wordsworth. I felt that, therefore, it was incumbent upon me, in fairness, to make an agreement with Wordsworth and Overmyer. I was fully competent to handle this part of the litigation, but I didn't think it would [fol. 174] be fair for me to make an agreement with Wordsworth when Overmyer had given me a letter to him, and when I had met him through Mr. Overmyer, and leave Mr. Overmyer out. I told Wordsworth frankly that what I wanted was his active cooperation, and I told him that I hoped that the liquidator would come in here and intervene.

The Court:

Q. Did your arrangement between yourself, Wordsworth and Overmyer contemplate a joint fee, or a separate fee to each?

A. Jointly, because I was leaving it up to them for a division.

Q. You had nothing to do with the division. That was a division that Overmyer and Wordsworth made between themselves?

A. I did finally, but I have not gone into that. I will be glad to, if counsel want to go into it.

Mr. Langworthy:

Q. Would you explain that, please?

A. Overmyer came to my office—well, when I was over there, after I had had these talks with Mr. Pepys and Mr. Wordsworth, Mr. Overmyer's firm sent a cable to Mr. Pepys, or Mr. Wordsworth saying, I can't give you the exact language, but saying, "We have been largely responsible for the success of the civil suit. Counsel for Factor want to deal through us. We can handle this mat-
[fol. 175] ter better if we handle it alone."

Now, I am not giving you word for word, but that was the substance of it. Wordsworth asked me what this meant. He said, "This letter has come to me. I don't understand it." I didn't understand it.

The Court:

Q. Who was that letter from?

A. That was a letter from either the firm of Pettit, Olin & Overmyer, or Mr. Overmyer.

Q. Is it a letter?

A. It is not a letter. It is a cable.

Q. You are quoting now what Wordsworth told you?

A. I am quoting now what Wordsworth told me, and he had a cable there.

Mr. Langworthy:

Q. That was in July, 1931, when you were over there?

A. That was either in July, 1931, or in September, 1931, when I came back from the continent. I am not sure which. Well, I said to Mr. Wordsworth, "I don't know what that means any more than you do." I told him of the talks I had had with Mr. Overmyer and Mr. Pettit. I said, "You can act as you are advised in these premises. I would like very much to have your cooperation."

Then Wordsworth said, "Well, I will find out." And he wired back to Overmyer, and said he didn't understand that. Well, I was irritated, and when I got back here,
[fol. 176] along the latter part of September, Mr. Overmyer saw me. Well, I said, "We had negotiations, it wasn't my fault that no arrangement was made." I said, "It was Judge Pettit's fault." I said, "I don't understand what you meant by that telegram, that 'We are responsible for the civil suit.'" I said, "You have not had anything to do with our civil suit, except you gave me some information here."

Well, he said that was Judge Pettit's fault, it was not his. He said, "We didn't mean by 'we' our firm. We meant you and we." Well, I said it didn't seem so to me, but he said that was the fact. I said, "You sent me to Mr. Wordsworth, gave me a letter, I would not have gone on as I did there without the letter, and without the feeling that I was doing it with your consent." I said, "I am perfectly willing to do what I agreed. I will take fifty per cent if Mr. Wordsworth will cooperate with us. You and he can divide the balance."

I said, "It is absolutely necessary to have counsel of standing in London in this case." I said, "I have handled litigation in London before, and I know what I am talking about." Well, he didn't say more than that then. The next meeting that I remember—do you want me to go on, [fol. 177] or have I answered what you had in mind?

Q. Perhaps you have, Mr. Lee.

A. What?

Q. I say, perhaps you have.

A. I am not giving you the exact words, I can't remember them, but I am giving you the essence of what happened.

Q. But that does not exactly explain why the division of twenty to Wordsworth and thirty to Overmyer.

A. All right, I will tell you how that came up. Mr. Overmyer came over to my office—Mr. Gilbert asked me to produce here the agreement with Mr. Overmyer, which I have. Mr. Overmyer came over to my office on I think the 4th of January, or the 5th, with a letter that he had received from Mr. Levinson.

Mr. Levinson said that Mr. Overmyer had been representing the liquidator—again I am just giving you my best recollection—for a long time. The liquidator represented all these persons injured, and he, Levinson, would rather deal through Mr. Overmyer, he would like to talk with him, and negotiate about this matter, he thought he was the man to deal with.

Now, Overmyer said to me that he thought he would like to come to some arrangement with me. "All right," I said, "what do you think my services are worth in this matter?" He said fifty per cent. I said, "All right. I have already [fol. 178] said that that is acceptable to me." Then I said, "You take this up with Mr. Wordsworth, find what the arrangement is to be between you and him." "Well," he

said, "I wish you would do that." "Well," I said, "that is not my business. What do you think ought to be the division?" "Well," he said, "I think Mr. Wordsworth ought to get fifteen per cent, and I ought to get thirty-five per cent." He said, "What do you think?" I said, "I will just be as frank with you as you are with me. I think Mr. Wordsworth ought to get more than that. We are going over there, we are going to use his office, we are going to use his time, he is a leading solicitor over there, I wouldn't want to go over there and trespass on his time. He has told me when I was over there that anything that was fair he would agree to," which he had.

I said, "I don't think that would be fair."

Now, I am not sure about this next, but I think he asked me what I thought would be fair, and I think that I said twenty-five per cent to each, I am not sure of that, I think that that was said. Anyhow, he said, "Well, I tell you, if you feel that way about it, I will take thirty per cent, and give Mr. Wordsworth twenty per cent." I said, "Well, take it up with him." He said, "No, I wish you would take it up." I said, "All right, I will call him up."

[fol. 179] And I called him up over the phone, he said, "That's all right with me". Overmyer said that if a lot of time was taken over there in Wordsworth's office, he would take that into consideration in considering whether he ought to take less. As a result of that, we made this agreement, after I had talked with Mr. Wordsworth.

Q. For the sake of the record, may we have it introduced in evidence?

A. Well, it is my original agreement. Will you give it back, and let me introduce a copy?

Q. Certainly, most assuredly.

A. All right.

The Court: Have the stenographer copy it into the record now.

The Witness: Well, I will just furnish a copy, if the Court please.

The Court: Very well.

The Witness: And let counsel compare it after I do it.

Mr. Gilbert: It may be stipulated, as far as we are concerned, that a photostatic copy may be substituted for the record.

The Court:

Q. Will you state the substance of that contract for us?

A. Yes. The substance of the contract is that I shall receive fifty per cent, Mr. Wordsworth twenty per cent, Mr. [fol. 180] Overmyer thirty per cent.

Q. And the contract is between you and Overmyer?

A. Myself, Overmyer and Mr. Wordsworth. May I see that contract a minute?

Mr. Langworthy: Yes. Let the reporter mark it before we go further, Pepys' Exhibit 3.

(Which said document, so offered and received in evidence, was marked Pepys Exhibit No. 3, and the same is in the words and figures following to wit:)

PEPYS' EXHIBIT 3

[fol. 181] This agreement, made this 6th day of January 1932, between John H. S. Lee of the City of Chicago, Illinois, party of the first part, Franklin R. Overmyer of the same place, party of the second part, and R. Wordsworth of the City of London, England, party of the third part, Witnesseth: That,

Whereas, the said Lee heretofore filed a bill in the District Court of the United States on behalf of Arthur Traviss Faber and Adah Hayhurst, and on behalf of all other persons similarly situated, against one J. Factor, his wife, and various Banks in the City of Chicago, Illinois; and, Whereas, thereafter the party of the third part sent to the party of the first part the claims of a large number of other citizens and residents of Great Britain represented by him with the request that the party of the first part file a petition on behalf of such parties for leave to become parties to such suit and intervene therein; and, Whereas, the party of the second part heretofore furnished to the party of the first part a copy of various affidavits and evidence used by the party of the second part in connection with a certain extradition proceeding pending in Chicago against the said Factor; and,

Whereas, the parties of the first and second part heretofore had several conferences for the purpose of making some agreement for mutual co-operation in the premises and for a division of any fees received therein; and,

Whereas, no agreement was, however, reached; and, Whereas, the party of the second part wishes to co-operate in every way possible with the parties of the first and third parts in carrying the above litigation to a successful conclusion by settlement or otherwise:

Now, therefore, for and in consideration of the sum of One Dollar each to the other in hand paid, and other good [fol. 182] and valuable considerations, the receipt whereof are hereby respectively acknowledged by the parties hereto, it is hereby agreed:

1. The party of the first part shall continue to have the exclusive conduct and control of the pending suit and of the decision as to whether and upon what terms the same shall be settled, subject however to the terms and provisions of the contracts heretofore made with the parties of the first and/or third parts by the complainants and intervening petitioners. The party of the second part agrees, however, to co-operate in every way possible with the party of the first part in carrying such suit to a successful outcome, whether as the result of its continued litigation in the lower and upper courts or the compromise or settlement thereof.

2. If in the opinion of the party of the first part it shall be necessary to take the depositions of witnesses in England the party of the first part shall superintend the taking of the same; provided however, that the party of the second part may at his election co-operate in such work. Neither the party of the first nor the second part shall, however, receive any compensation for such services other than that hereinafter set forth.

3. The complainants and the parties intervening, as well as their attorneys, shall, out of any sum recovered, be reimbursed for all expenses incurred in connection with said litigation, including court costs, stenographic charges, cable and telephone charges, witness fees, traveling and other expenses while absent from Chicago, heretofore or hereafter incurred by the party of the first part; and if the party of the second part shall elect to accompany the party of the first part, as herein provided, to take depositions in [fol. 183] England, then in that event his traveling and

other expenses while absent from Chicago shall be reimbursed and paid to the parties who shall have advanced and paid any of such sums,—all prior to ascertaining the net amount out of which any fee shall be paid.

4. The parties further agree that any and all fees contracted for and/or received by the parties of the first, second or third part for services rendered in the above suit, or in any suit hereafter instituted against the defendants to the present suit, or any of them, based upon the fraud or acts of the defendant Factor, whether any such suit or suits shall be carried to a final determination or shall be settled, shall be divided as follows: Fifty per cent (50%) of any such fees shall belong and be paid to the party of the first part; thirty per cent (30%) of any such fees shall belong and be paid to the party of the second part, and twenty per cent (20%) of any such fees shall belong and be paid to the party of the third part.

5. This agreement is made subject to the terms, provisions and conditions of the agreements heretofore made by the complainants and intervening petitioners with the parties of the first and/or third parts respectively.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

John H. S. Lee. (Seal.) Franklin R. Overmyer. (Seal.) —— ——. (Seal.)

[fol. 184] A. When I sent this copy over to Mr. Wordsworth, he said to me that Mr. Pepys did not like the first paragraph. He said the first paragraph says, "The party of the first part," that is myself, "shall continue to have the exclusive conduct and control of the pending suit and the decision as to whether and upon what terms the same shall be settled." He said, "Pepys wants to be absolutely free to decide for himself what he is going to do, and whether he makes a settlement."

I said that this was not intended to control Pepys in any way. I wanted to retain the right to completely control the civil suit. I said, "Mr. Levinson is negotiating with Mr. Overmyer, and I am not going to be put in a position where there is any question about Mr. Overmyer's right to control my suit." I said, "If that is your feeling,

you may insert in your copy the words 'The party of the first part, as between himself and the party of the second part, shall continue to have the exclusive conduct.' "

He asked me to confirm that, I did so, and I got Mr. Overmyer over, and he consented to that.

Mr. Langworthy:

Q. Mr. Wordsworth had agreed to cooperate with you when you were in England, in July?

A. That's right.

[fol. 185] Q. Previous?

A. That is right.

Q. And as a result of that agreement, Pepys Exhibits 1 and 2 were sent out by Mr. Wordsworth?

A. May I see those, please? That's right. These were shown to me, as I remember, when I returned from the continent in September.

Q. But they had already been sent out.

A. Oh, long before.

Q. And there were many authorizations for you to intervene received and in Mr. Wordsworth's office when you got back from the continent.

A. Quite a bundle of them.

The Court: While we are on that contract, may I ask you a question? Is Mr. Overmyer before the Court in any way in connection with the allowance of the fee?

Mr. Healy: Beg pardon? I didn't catch that.

The Court: I say, is Mr. Overmyer before the Court in any way in connection with the allowance of this fee?

Mr. Healy: No, your Honor.

The Court: The contract here is a little uncertain. The contract says the fee shall be fixed by the Court. The language is that the attorneys, "The attorneys", "attorneys" is in the plural, and an apostrophe is after the "s"—"The attorneys' fees to be so determined herein by the Court shall be determined * * * (reading)."

[fol. 186] In other words, under the contract is the Court at liberty to fix a fee for Mr. Lee, a fee for Mr. Wordsworth and a fee for Mr. Overmyer?

Mr. Healy: No.

The Court: Or, is the Court obliged under this agreement to intermingle it, so that if the Court should reach

the conclusion one of the attorneys is not entitled to the fee, he can disallow the entire fee.

Mr. Healy: No, I don't understand the contract that way, if your Honor please. I understand that under the contract, the Court is called upon to fix Mr. Lee's fee, and that the entire award, so far as the attorneys' fee is concerned, is to go to him.

The Court: Now, is the Court obliged, in fixing this fee, to include Mr. Overmyer?

Mr. Langworthy: May I say this? The record now shows that Mr. Lee has filed or furnished me with a statement, and that statement does include services—it gives the names of men whose services are to be included, and in that is Mr. Overmyer.

The Court: I don't know to what extent it may enter into this case, but I might as well say to you now that it appears from the record here that one of the counsel in that matter represented the British government in this case, and it is a grave question of public policy and pro- [fol. 187] priety in a situation of that kind. I am stating it now in order that Mr. Overmyer or anybody else who is interested may come in and argue it. I did not want the record closed without counsel understanding that is in the mind of the Court, and that question will have to be decided here.

Mr. Langworthy: We are not taking this on that ground, your Honor, as far as I am concerned. My position is this:

The Court: I would be glad to have you state it.

The Witness: I would like to be heard on that.

Mr. Langworthy: Mr. Lee has stated on the stand that the services performed by Mr. Overmyer—I think in response to my question—the services performed by Mr. Overmyer, for which he is asking the Court to fix compensation consisted of, I think he said there were a half a dozen or possibly a dozen conferences between himself and Mr. Overmyer; he also said that Mr. Overmyer had furnished him a number of statements, I have not asked him what they were, which he used in preparing—which he used in part in preparing the second amended bill.

The Court: Here is my point. It is not a question of whether you raise it or not. You can raise it or not as you

see fit. But as I understand it from this record—I may [fol. 188] be mistaken about it—one of these lawyers was in the position of public prosecutor.

Mr. Langworthy: That is right.

The Court: And he makes a contract for a fee to be paid in a civil action, the objective of which arises out of the same subject matter of his activities as a public prosecutor.

The Witness: I would like to be heard for a moment, on the stand. May I?

The Court: Yes, surely.

Mr. Healy: Yes. You are so much more familiar with the matter.

The Court: For the purpose of illustration, here is a State's Attorney, for instance, who has a man indicted in a criminal court for obtaining money under false pretenses. He makes a contract with reference to his fee in a civil suit, the object of which is to recover the money for which he is prosecuting, out of which the prosecution arises.

Mr. Lee: Well, the situation was this: He was representing the liquidator at the time that I saw him over in England.

The Court: He was also representing the British consul, wasn't he?

A. Yes, surely.

[fol. 189] Q. In the extradition proceedings?

A. Surely.

Q. And was prosecuting Factor before the Commissioner. Now, Overmyer, while he is prosecuting him, makes a contract to get his fee in a civil case.

A. No, I understand the prosecution—the Commissioner had handed down his decision before this contract was made; but anyhow the entire negotiations were while that was so.

Q. Mr. Overmyer appeared here before Judge Carpenter, and argued it?

A. Yes.

Q. And that is now before the Court of Appeals?

A. Yes.

Q. And he tried that case in the Court of Appeals?

A. Yes.

Q. So that he could simply give this man his liberty by simply dismissing his appeal?

A. Well, I think that in fairness to him it should be said this: That Mr. Levinson was saying that Mr. Overmyer was the proper person to represent the claimants over there, that he was representing the liquidator.

Mr. Gilbert: In the matter of a settlement, in the matter of a settlement. But he didn't know, and we didn't know, that Mr. Overmyer had any interest in this civil action that you had brought, none in the world. Mr. Levinson was trying to negotiate some adjustment in the matter.

[fol. 190] A. Surely.

Mr. Gilbert: But we didn't know that he had any interest in your civil case.

A. Oh, well, I don't know that he did. But he was saying that Mr. Overmyer, as representative of the consul—of the liquidator—had the right to, and he was the proper person to deal with in the settlement of the civil claim. Mr. Overmyer told me—I said to Mr. Overmyer, when I first went to him, if your Honor please, this: That I was going to have a stenographer present before the Commissioner to get the evidence.

"Well", he said, "I have statements here. You won't have to do that." He said that he couldn't see that giving those was in any way subject to criticism, because I was trying to collect money for the people who claimed that they had been defrauded in England.

The Court: I don't think there is any impropriety in giving you all the information possible, that was not the point in my mind. The point that is in my mind is the propriety of his participating as counsel in the prosecution of a criminal case, and as counsel in the civil case.

A. There is this to be said, that in the various interviews with Mr. Gilbert, Mr. Levinson and others, Mr. Overmyer at all times said that the civil case had nothing to do with [fol. 191] the criminal case, that the British government was going to prosecute that criminal case to the end.

Mr. Gilbert: And that he had no interest in the suit.

A. He didn't say that in my presence.

Mr. Gilbert: He said it in the presence of the Circuit Court of Appeals.

A. Oh, well, I don't know about that.

The Court: Are you sure that statement was made?

Mr. Gilbert: Oh, absolutely.

The Court: Have you the transcript?

Mr. Gilbert: No, we haven't. That was in chambers, before three judges.

A. I don't know about that. But I do know that the British consul knew he was handling this matter for the liquidator.

Mr. Gilbert: Yes, he was the general representative of the liquidator, but the liquidator was not in the civil case. He talked about getting into it, and if he had, he would have performed an impropriety, but he didn't get in. He represented them generally.

A. The consul knew here, if the Court please, that Mr. Overmyer was representing the liquidator. Now, that is what Mr. Overmyer told me. He knew that the liquidator [fol. 192] was intending or contemplating intervening in this suit. This arrangement was an arrangement whereby we hoped that the liquidator would intervene in the suit, when I went to England and when I had these talks with Mr. Overmyer, would intervene in the suit on behalf of these persons. It was known, as I understand, by everybody, that Mr. Overmyer was representing the liquidator in that way.

The Court: Well, he may be entitled to a fee from the liquidator, but that is entirely different from taking a fee in a civil suit, isn't it?

A. Well, let me say this, if the Court please. If the liquidator had taken action here, being represented by Overmyer, the liquidator would have been attempting precisely the same thing that I was attempting. The only difference would have been this: Isn't this true, if your Honor please?

My suit was a suit seeking to recover money for the individual parties who had been defrauded. Mr. Overmyer through the liquidator, was seeking to recover the same money, precisely, on the theory that that money belonged not to the individuals, but to the Broad Street Press. If he is subject to criticism in one event, he is subject to criticism in the other, as far as I can see. If I am not right in that, then I am in error.

The Court: Of course, I am not drawing any conclusion [fol: 193] in regard to it at all, because Mr. Overmyer is not here, but that question did arise in my mind.

A. Well, that is a criticism of my judgment; I supposed, when he was representing the liquidator, when the liquida-

tor independently—everybody knew it—when Mr. Levinson's firm was going to him and saying "You are the man that ought to represent these people, we want to deal with you alone"; when they all knew that, when the consul knew it, and knew what he was attempting to do, I did not think the fact he was cooperating with me to do the same thing was subject to criticism, and I cannot see it now. There is nothing secret about this thing, as far as I was concerned. Everybody knew it, the liquidator knew it, the consul knew it, Mr. Levinson's firm knew it, they were seeking to go to him, and negotiate through him. And to negotiate what? To settle the precise thing that I was handling.

If I am subject to criticism, then Mr. Levinson and every member of his firm, and Senator Glenn are subject to the same criticism.

Mr. Gilbert: I did not understand the Court was saying anything critical of you, Mr. Lee.

The Court: No, I am not criticizing you.

A. It would criticize me if I made a contract with a man that was subject to criticism.

Mr. Gilbert: Well, we will get to it later.

[fol. 194] Mr. Langworthy:

Q. You mentioned a man's name, Hawkins.

A. Hawkins, yes.

Q. Was Hawkins a man in Chicago?

A. Will you talk a little louder, please? Just a little?

Q. I beg your pardon. Was Hawkins a man in Chicago, or a man in London?

A. Hawkins was a man in Chicago that employed a man in London by the name of Hyde, as I remember it, to negotiate these claims, and we found, or were informed, that Mr. Hawkins was cooperating with Mr. Factor.

Q. Well, you say something about a bankruptcy proceeding.

A. Yes.

Q. Was a bankruptcy proceeding to be brought in Chicago, or in London?

A. The bankruptcy proceeding was contemplated to be brought by creditors of the Broad Street Press in Chicago, if they could get the creditors to join in the bankruptcy proceeding.

Q. Wasn't Broad Street Press, Ltd., an English corporation?

A. Surely.

Q. Never transacted any business in the United States?

A. I don't know whether they did or not.

Q. What possible jurisdiction could the Courts here have?

A. I am not a bankruptcy lawyer, I never handled a case, but that is what they were trying to do; I have never handled [fol. 195] a case in bankruptcy in my life. I guess they found that out themselves, because they didn't pursue the matter any further.

Q. In the statements furnished, you gave a certain number of days' time, and hours. Was a record kept of the time spent on this proceeding by you, or is this more or less of an estimate?

A. The exact record was kept of the days and hours that I spent, except in London in 1931, and except that in 1932 I spent all my time in this in London, but I did not keep always the exact data as to what I was working on, but I knew what I was working on. It is not a guess at all.

Q. Well, I didn't say it was a guess, I didn't mean to use the word "guess".

A. You said "guess", didn't you? "Is it your guess?"

Q. I don't know.

A. Read the question.

Q. I think I said "estimate".

A. What was that question? Maybe I am wrong.

(Last question read by the reporter.)

A. Well, an estimate is a guess, isn't it?

Q. Now, there was, I take it, a record also made by McConnell with reference to the time he spent.

A. He is going to take the stand, you can ask him about that. I think that he kept his record, too.

[fol. 196] Q. Mr. Lee, is there a usual and customary fee in Chicago paid to lawyers for services similar to the services that you performed in this proceeding?

A. I think so.

Q. Where the compensation is not uncertain, where it is to be paid in cash?

A. Oh, I didn't mean to testify to that, Mr. Langworthy. If the compensation is on a per diem basis, I think that there may be some fee per day, but I was not meaning to testify

to that. I meant that if the matter was on a contingent basis, in my testimony, when I said a third.

Q. I realize that, Mr. Lee.

A. Yes.

Q. But my question to you was, in the services, not talking now about your personal service in the case, is there a usual and customary fee that is paid to lawyers in Chicago for similar services, where the services are being paid for in cash.

A. What were your last words?

Q. If the services are being paid for in cash.

A. I don't know that there is, for this reason: There would undoubtedly be a substantial per diem and a substantial retainer, and undoubtedly a great many counsel say to their clients, "Now, see here: In a matter involving a large sum of this kind, I must take into consideration, when I finally fix my fee, what I have gotten, what I have [fol. 197] accomplished, and all that kind of thing," and that would deal with so many different situations that there might not be a usual and customary fee.

At any rate, that was not what I was testifying to in answer to Mr. Healy's question. It is not what I intended to answer, I mean.

Q. I didn't for once assume that you intended to answer that in your answer, but I am trying to get an answer to my question.

A. And I gave you that. I don't know what——

Q. Well, can't you answer it any better?

Mr. Healy: Well, counsel now, if your Honor please, is trying to make Mr. Lee his own witness. This is not cross examination. Mr. Lee has testified to the value of the fee on a contingent basis. Now he is trying on cross examination to show what a usual and customary fee will be as a matter of contract between the parties.

The Court: The fee in this case, upon the language of the agreement, is fixed on a contingent basis, and he has testified to the value of his services on that basis.

Mr. Langworthy: I think, even so, that counsel has also some latitude where a witness expresses an opinion in cross examination.

The Court: Yes, I think perhaps that is true. You may ask him.

A. I cannot testify as to whether there is or is not such [fol. 198] a usual and customary fee, where the services are not contingent.

Mr. Langworthy:

Q. Now, in this contract, the words I believe are added "upon a contingent basis." Do I quote it correctly, Mr. Lee?

A. I suppose so.

Q. Now, what do you understand those words to mean?

A. Those words mean this: That if the situation is one where we had not—well, up to that time I had been acting on a contingent basis. All the parties, as I understood, admitted it, Mr. Pepys admitted it, and we were simply carrying on the understanding that I already had, that my fee up to that time had been contingent upon success. In other words, if I was not successful, I would have gotten nothing. If I was successful, I would get a fee contingent upon the success. Therefore, the agreement was——

Q. Well, that agreement didn't change the agreement contained in Pepys Exhibit 1? That is, substantially what is in Pepys Exhibit 1, signed when the interveners employed you?

A. It was continuing the contingent basis of my compensation.

Q. Yes, and it is substantially the continuation of your understanding over the telephone when you were em- [fol. 199] ployed?

A. Surely.

Q. On behalf of Mr. Faber.

A. Surely.

Q. Am I right about that?

A. I think that would be the legal interpretation, as a matter of law.

Q. Yes. Well, then, it simply means on a contingent basis, that the Court should take into consideration in fixing the fee the hazard that you took in the transaction, am I right about that?

A. I should think that that was so.

Q. I beg pardon?

A. I should think that that was so. A great many people thought this was a very hazardous case. Opposing

counsel said it would go through the window—I believe the phraseology was I hadn't a leg to stand on, and it would go through the window on the first opportunity, or something of that kind.

Q. From your examination of the documents furnished you by Mr. Overmyer, you were certain that if you could prove the facts as disclosed by those documents, why there was no hazard to the litigation, assuming that you had a fund in legal custody upon which to impress the proof, isn't that right, Mr. Lee?

A. May I answer that?

Q. Yes.

A. Assuming that the facts were as all of us, I suppose, were informed, and assuming the Court would decide the [fol. 200] legal propositions as I believed they were correct, and assuming the decision all along the line would be in my favor, I thought that I was certainly on the facts and the law entitled to recover, but I thought that it was a very involved matter, and, after practicing law for some forty years, the Courts do not always agree with me on the legal propositions. In this case they did.

Q. Mr. Lee, I take it that you are sometimes employed by the day, and have a standard charge by the day. Am I right about that?

A. Yes, certainly.

Q. And what is your standard charge, where you work by the day?

A. Well, usually I would charge a retainer, a substantial retainer, probably two hundred dollars a day, and then I would ask my client to take into consideration, if it was a very large matter, the result of the suit in determining whether I should receive additional compensation. I have handled a great many large matters, and I have found this, that when you get into a large matter, you simply have to concentrate on that, you have to let other matters go, and that is the only way I know of being successful in a case.

Q. Mr. Lee, do you know of other cases and other employments similar to this in Chicago, in United States courts?

[fol. 201] A. Oh, I don't know any case similar to this. This is a very novel and new case. It presented a lot of comparatively new propositions.

Q. Well, then, there could hardly be a usual and customary contingent fee in this class of cases, could there?

A. The fact that the case involves a large number of questions that are complex——

Q. No, can't that question be answered yes or no.

A. I don't believe so. Your conclusion does not arise from the premise, or follow the premise, I meant to say.

Q. Beg pardon?

A. Your conclusion does not follow the premise, as I see it.

Q. Well, I did not wish to interrupt anything you wish to add.

A. I have finished.

Q. Mr. Lee, I don't want to appear hostile in any way.

A. No. And I don't want to appear hostile.

Q. Have you a standard charge for Mr. McConnell's services by the day?

A. Oh, sometimes—I haven't a standard charge. Sometimes we charge a hundred dollars a day, where it is paid for, sometimes more, sometimes less.

Mr. Langworthy: All right.

Mr. Gilbert: May I cross examine the witness, your Honor?

The Court: Very well.

[fol. 202] Cross-examination.

By Mr. Gilbert:

Q. Mr. Lee, prior to May of 1931 you never heard of Mr. Factor or Rev. Faber, is that true, prior to May 1931?

A. As far as I remember. When were the articles in the newspapers here, when did they begin?

Q. Not until after the first of May.

A. Well, I would say that I had never heard of either.

Q. But the first time you heard of Mr. Factor was probably about May 12, wasn't it, 1931?

A. I can't tell you that.

Q. Whenever the newspaper articles began to appear, that is the first you heard of him?

A. That is the best of my recollection, Mr. Gilbert.

Q. Well, shortly after that time, you have testified you received a telephone call from Tamplin & Company, in London.

A. Yes.

Q. About when was that, in relation to the first newspaper article?

A. I can't tell you. I don't even know when the first newspaper article was.

Q. Well, I think the first newspaper article was on May 13, or possibly the 14th. It was at least a day or two after the first application was made to Commissioner Walker for a warrant of extradition, and you read the newspapers, and you probably read that, because it was [fol. 203] on the front page.

A. Well, I undoubtedly saw it.

Q. Now, could you fix the time of the telephone conversation in relation to the first newspaper article?

A. I think the authorization and direction that I got to file the bill was received just a short time before the bill was filed.

Q. A short time before May 20th?

A. That is right.

Q. Might it have been around May 12th?

A. I don't think so.

Q. Could it have been prior to then?

A. Because we acted very hurriedly. I don't think so.

Q. Could it have been prior to May 12th?

A. No, it could not, I think.

Q. But it was prior to May 20th?

A. It was prior to May 20th. That is, I received the direction and authorization to file the bill prior to May 20th, if that was the time; anyhow, prior to the date the bill was filed.

Q. That was by telephone from Tamplin & Company, in London?

A. From somebody in Tamplin & Company.

Q. Well, you secured some further information from someone before the filing of the bill, didn't you, Mr. Lee, other than the telephone conversation with Tamplin?

A. Yes.

Q. But I am not going to ask you who you got it from, [fol. 204] I am going to ask you the specification. You received some other information.

A. I did.

Q. You had had a talk, had you not, with Overmyer, prior to the filing of the bill?

A. I never did; no, to the best of my recollection, I never saw Overmyer until after I had filed the bill, and I am sure it was May 23rd.

Q. May 21st?

A. May 23rd, I think.

Q. May 23rd.

A. On the 21st, I saw the consul, I know from my diary. The 22nd I came down to the Commissioner's office, and was making arrangements for a stenographer, and the 23rd I saw Pefit and Overmyer. I don't think I saw them on the 22nd.

Q. But before May 20th you talked with somebody undisclosed, some undisclosed person, who gave you the information chiefly from which you drew the bill of complaint in the first instance?

A. I had other sources of information.

Q. I am asked to ask you this question: Was the undisclosed person a resident of Chicago?

A. Is that material, if the Court please?

The Court: Is it objected to?

Mr. Healy: Yes, I object to it.

Mr. Gilbert: I will withdraw the question.

[fol. 205] The Court: Of what materiality is it?

Mr. Gilbert: I will withdraw the question.

The Court: We cannot broaden this inquiry to cover everything in connection with this litigation. The sole question is the value of these services.

Mr. Gilbert: That is what I am trying to get at, your Honor.

The Court: It is agreed the services were performed, and the question of compensation is before us.

Mr. Gilbert: That is right, your Honor.

The Court: There are not a great many side issues in this case. Let us not go into them, let us not go into any issues with which the case is not concerned.

Mr. Gilbert: I don't wish to go into them.

The Court: Well, how is that material in the value?

Mr. Gilbert: The question here is this: There is a contract, your Honor, and I shall develop the method and manner in which it was entered into, not in criticism of Mr. Lee, but there must be in the mind of the Court, and there must necessarily be in this case, because whatever award is

made to Mr. Lee must be by him turned over, a certain percentage, to Overmyer and Wordsworth.

The Court: That is what I had in mind when I asked the question here a while ago. As I have been reading that agreement, it leaves it to the Court to fix Mr. Lee's fees. [fol. 206] The others fees the Court is not concerned with. He can give it away if he wants to.

Mr. Gilbert: Yes, indeed.

The Court: He can pay it to the British consul if he wants to.

Mr. Gilbert: Certainly.

The Court: Or he can hand it back to Factor if he wants to.

Mr. Gilbert: Certainly.

The Court: The question is, what his services are worth in this case.

The Court: But he said he has not included anything to Mr. Overmyer on acount of any services directly in this case.

The Witness: Not a thing, no, not directly.

Mr. Langworthy: I had understood there were a dozen conferences included.

The Witness: I included the time I talked with him in several conferences.

The Court: But nothing for himself.

The Witness: Not at all.

Mr. Langworthy: Well, that is clear now.

The Court: Yes, that is clear.

Mr. Langworthy: I had not understood it that way.

The Court: He has put this up to the Court on the basis of services rendered by himself and his associates in England.

[fol. 207] A. That is exactly true.

The Court: And in Chicago.

Mr. Langworthy: For Mr. McConnell, and about three hundred dollars for a lawyer in New York, and then there are some minor items in the bill of particulars.

A. Well, that is not included—just minor items, yes, out-of-pocket expenses, as it were.

Q. Those are included in out-of-pocket expenses, are they?

A. Yes.

Mr. Langworthy: Well, then, I don't need to bother about it.

The Witness: Well, those are not included in out-of-pocket expenses, I didn't mean that.

The Court: Let's go along.

Mr. Gilbert: I don't think counsel will object to the line of questions I want to ask him, your Honor, but I don't want to impose upon your Honor's time, but I think we should have some understanding of the circumstances leading up to the filing of this bill.

The Court: Oh, I can't see the circumstances leading up to the filing are involved, except that they may involve the character of the services.

Mr. Gilbert: May I proceed?

The Court: Yes.

Mr. Gilbert: If your Honor doesn't think I am imposing [fol. 208] upon the Court.

The Witness: There are a lot of circumstances here I have not brought in that might be very relevant.

The Court: Go ahead.

Mr. Gilbert:

Q. Well, after the bill was filed, which was sketchy, and necessarily so because of the brief time in which you had to prepare it and make the examination, you went to see Mr. Haggard, the British Consul-General in Chicago?

A. I did.

Q. And you discussed with him then the fact that you had been employed or retained by some one to represent Mr. Faber, and asked him what he knew about this situation, is that right?

A. I asked him for any facts that he could give me on the situation.

Q. And he referred you to Mr. Overmyer?

A. Well, he said that they were interested in the extradition proceedings; and I couldn't get anything out of him. He said, "You may see Mr. Overmyer and talk with him about whether or not you shall have the facts."

Q. You then went to Mr. Overmyer's office and saw Mr. Overmyer and Mr. Petit?

A. Well, I didn't go directly there. I came down and made arrangements. He was so disinterested that I thought

[fol. 209] it was useless at first to go to Overmyer. I went down here to arrange to have a stenographer take the testimony. Then I talked the matter over with Mr. McConnell, we talked it over, and we went over to see Overmyer, asked him if he would have any objection to furnishing me any facts that he had.

I first said that I had made arrangements to take the testimony, and he said he didn't think it was necessary.

Q. And you asked him if he would give you any information?

A. I asked him if he could give me any. He said he had affidavits and statements. I said I would like to have a chance to see them.

Q. And he said he would let you see them?

A. He did.

Q. And in that first conversation——

A. I am not sure that he said that. I think he did then say that he could see no objection to that.

Q. On May 20th?

A. No, that was not the 20th.

Q. May 23rd?

A. It was the 23rd.

Q. May 23rd. And did he then show you some ex parte affidavits taken at the Guild Hall, London, England, before somebody by the name of Blackwell?

A. I can't remember the exact time when he handed me [fol. 210] a volume.

Q. I don't want to confuse you. It may not have been on the 23rd, it may have been the 24th or 25th, may it not?

A. It may have been the 24th—or not on the 24th, because it was Sunday. It may have been Monday, early in the next week, or it may have been that day.

Q. Did he tell you then that he was going to dismiss this present application for extradition, and bring a new one.

A. No, I don't think that we went into the question of extradition. I was not interested in that.

Q. Well, at that conversation I believe you testified yesterday, Mr. Lee, the subject of an arrangement between he and you was first mentioned by him, or by Petit.

A. I don't know whether we went into it at that conversation or the next, and I don't know whether he——

Q. Well, at least you had that conversation before these ex parte affidavits were shown to you?

A. I don't know that. I can't tell you that, Mr. Gilbert.

Q. Well, will you give me your best recollection of who first mentioned an arrangement between his office and your office, and a division of fees, in return for them furnishing you with these affidavits? They broached it, didn't they, you didn't?

[fol. 211] A. Well, I don't want to be unfair to them. Now, I know that in the conversation they said that they represented the liquidator, and were themselves thinking of either instituting an independent suit, or the question of intervention came up. Now, I may have said, "I would like very much to have you intervene in our matter", but I think they brought up the question of the fees or division first.

Q. Who brought it up?

A. I think Petit did.

Q. Mr. Petit?

A. Overmyer was there, though, I think.

Q. And that was at either the first or second conversation which took place around the 23rd to the 25th of May, 1931.

A. It was one of the first conversations. I had two or three.

Q. Well, now, just to be perfectly frank about it, you did not expect them to render any legal services, you expected them to give you, or wanted them to give you these documents which had been furnished them by the British government, and you did not want to pay them for it, but they demanded that you share the fee in return for it.

A. Oh, no. Petit said—or Overmyer said to me Petit was an ex-Judge here that I know, and that he could jump in and help along the line in these services rendered. He [fol. 212] never did.

Q. Well, the contract——

A. (Continuing:) —I said to them this. Judge Petit suggested that I take forty percent.

Q. And they take sixty?

A. And they take sixty.

Q. And that was at the first time it was mentioned.

A. Yes. And I said, "Well, I will consider that, if you have this attorney over in England that we have got to have, we have got to have solicitors over there, and I will consider that if you will do your share of the work here."

And then later Petit wanted to deduct, first the charge of

any solicitors in England, before we took sixty and forty, and I said that didn't appeal to me, and that was the way the thing was left until I went abroad.

Q. Well, to get on here with the matter, your contract of January 8, 1932—or January 6, 1932, recites that one of the considerations, at least, for the division of thirty percent to Overmyer was furnishing certain affidavits and certain documents, does it not?

A. I think it does. Overmyer had furnished those.

Q. May I look at that contract?

A. Surely. Here it is.

Q. The matter I refer to appears in the third paragraph, first sheet, doesn't it, Mr. Lee?

A. May I just look at that? I am sure it does. Yes, it is in the second paragraph.

Q. The second paragraph of the first sheet. And it also [fol. 213] recites that Mr. Overmyer is to cooperate in every possible way.

A. That is right.

Q. You did not call upon him to assist you in your civil case, did you?

A. No, because he was tied up, he told me that he couldn't, that the criminal prosecution was first, and that he would have to devote any time that he had to spare in the matter. I was not relying upon Overmyer in the civil case.

Q. The fact of the matter is, that division of fees was considered at the outset for him giving you these documents, and for what he told you he was going to do in the extradition case.

A. No, it is because he represented the liquidator. The liquidator had all the evidence in England in his possession, and he and his attorneys there had this case down at their fingers' ends, so they said, and I simply wanted to get the cooperation of the people that could help us. I would not represent for a moment that I wanted Mr. Overmyer to help me in actual court work. I can handle that myself. But I wanted assistance in England.

Q. Then later on, in July, you had another conversation with Overmyer and Petit, you testified to yesterday, just before you went to Europe.

[fol. 214] A. Then I was in error. I saw Overmyer, and I said, "See here; I am going to go to Europe", he gave me

the letter. "Can we come to some understanding here between us?" Petit said he was busy about other matters, he couldn't take it up. I said, "All right, then, that is not my fault." I don't think I said that Petit was in the last conference, because he was busy, pretended anyhow he was.

Q. Well, was the subject of the division of fees discussed at that time?

A. No, I don't think so. I wanted to have a talk with Petit, and he was busy, and I don't think that that came up again.

Q. Well, when you went over to England for the purpose of making some further investigation and meeting Mr. Wordsworth, the arrangement was still, there was an agreement, that there was to be a division of fees, but the exact amount of division had not yet been ascertained.

A. Overmyer said he thought that Judge Petit was busy, and he thought we could get together when I got back.

Q. But they had made it clear to you that they must have a division of the fees, and you agreed to it.

A. Yes.

Q. That's right, isn't it?

A. Yes. That is, if I got the services—if the liquidator was going in with me. They did not say that they would [fol. 215] intervene, they said they might file an independent bill, that they had not decided, and the liquidator had not decided, and we agreed that if their interests were in any way hostile respectively, why, that would change the situation.

Q. Well, now, Mr. Lee, wasn't it discussed upon several occasions, even before your going to Europe the first time, that it would not be helpful in the situation to have the liquidator intervene? Not that you brought up that subject, but didn't Mr. Overmyer bring up that subject?

A. No. The question was as to whether he could intervene.

Q. Yes.

A. We had been looking up the law, and I frankly stated that I thought that if a fight was made, there was a question there. We argued that out with Mr. Pepys, too. I asked him to try it, anyhow.

Q. Wasn't the subject of the intervention of Pepys discussed by Overmyer in relation to the propriety of his intervening, and its effect upon both cases?

A. No, not at all. He was deciding whether or not—Pepys and he were trying to decide whether it would be better for them to intervene in the suit I had instituted, or institute an independent suit. They said they were going to do one or the other, as they were advised.

Q. But they never did until this settlement.

[fol. 216] A. They never did until Mr. Langworthy intervened here.

Q. Until this settlement had been agreed upon by us in London.

A. Surely.

Mr. Langworthy:

Q. Wasn't that theory absolutely abandoned when Wordsworth agreed to send out letters to subscribers who employed you to intervene?

A. Not at all.

Mr. Langworthy: I should think it would be inconsistent.

A. Well, here is what Pepys said. I can tell you what he said. He said, "You have these funds tied up, apparently. I don't say I will not intervene, I don't want to take action, but I think it is not necessary for me to decide that now."

When I was over in London on this last trip, Mr. Pepys was still considering the question of intervening or filing a separate suit, he talked it over with me at length, and he asked me to meet this Mr. Campbell Lee and talk it over with him. He said Campbell Lee had given him different advice from mine. I said I would be glad to talk it over with him.

Mr. Healy:

Q. Did you talk it over with him?

A. No. This settlement came up, and the thing never came up.

Mr. Gilbert:

Q. Mr. Lee, at 1931 George Digby Pepys was the official senior receiver of companies in liquidation, under the Companies Liquidation Act of Great Britain, wasn't he?

[fol. 217] A. That is right.

Q. He is a government officer, isn't he?

A. Well, I suppose he is.

Q. He is appointed by the government, and is the official receiver for all companies that go into receivership in Great Britain?

A. I don't know who he is appointed by; but I do know he is receiver for all companies.

Q. And you do know he is a government officer?

A. I don't know who he is appointed by. If you say so, I will say I believe it.

Q. Well, I say so.

A. All right. I believe that.

The Court: By whom is he appointed, as a matter of fact?

Mr. Gilbert: What is that?

The Court: By whom is he appointed?

Mr. Gilbert: I think by the Home Office, I am not sure.

The Court: By whom?

Mr. Gilbert: The Home Office, the Secretary of the Home Office.

Mr. McConnell: By the Board of Trade.

The Witness: Mr. McConnell says by the Board of Trade.

Mr. McConnell: The Board of Trade.

Mr. Langworthy: But the Board of Trade is part of the government, isn't it?

Mr. McConnell: Yes.

[fol. 218] Mr. Gilbert: The Board of Trade, and they are a part of the government.

A. I didn't happen to know.

Mr. Gilbert:

Q. It is also true, is it not, Mr. Lee, you are well informed and advised on the English law, I know you are, that extradition is under the control directly of the public prosecutor, who is directly under the Attorney General, isn't that right?

A. I don't know anything more about extradition law than I know about bankruptcy law.

Q. I think that is true.

A. So you will have to ask somebody else. I never had an extradition case, I never had a bankruptcy case.

Q. I think this situation comes about by the fact of your lack of knowledge of extradition, perhaps, but Mr. Overmyer is an expert.

A. Well, I think you questioned that.

Q. Well, I have; but he is well informed.

A. Well, I don't know.

Q. You don't know that the public prosecutor is under the Attorney General, do you?

A. I don't know.

Q. Do you know that the public prosecutor and the official receiver have been in constant contact with each other from the inception of both the extradition and the institu-

[fol. 219] tion of the civil case?

A. I don't know. The public prosecutor asked me, as a matter of courtesy, to come around and see him, and I went around, and he asked me about our case, what we were doing, what the theory of it was, seemed to be very much interested in it, and so forth.

Q. And he seemed to be well advised of the situation, so far as the civil case was concerned?

A. He was not well advised about the law, I will say that, although he is a very estimable gentleman.

Q. Well, he had known what had transpired in the civil case, and knew what you were doing?

A. Oh, about the facts, he knew the facts. I talked with him at some length about it.

Q. Well, I mean that he knew you had come over there to take depositions in the civil case.

A. Oh, surely.

Q. And he knew that you had reached that point in the civil case.

A. Oh, surely. I told him, talked for an hour with him.

Q. Did he know anything about Mr. Overmyer's connection with you?

A. I don't know that. Pepys did. If Pepys had been in communication with him daily, I suppose he did, I don't know. I know the consul did. Mr. Overmyer told me so anyhow.

[fol. 220] Q. You mean regarding the British Consul General here?

A. Sure.

Q. He knew you had made some arrangement with Mr. Overmyer?

A. That is what Mr. Overmyer said. I didn't talk to Haggard.

Q. How early along the road was that? Right at the outset?

A. Oh, I think the first I heard of it was when this contract was made. Maybe a day before.

Q. Mr. Lee, let me ask you this question: Did the public prosecutor help you get some witnesses in England?

A. Well, he said he wanted to do anything he could.

Q. Yes.

A. That would facilitate my——

Q. Success in your case?

[fol. 221] Q. Success in your case——

A. He was interested. I told him these were all British subjects. Well, he said that he was interested in British subjects. I don't know that he agreed to co-operate but he showed a very much more friendly attitude than Mr. Haggard showed towards me.

Q. Did he assist you in getting some witnesses, he did, didn't he?

A. He may have, I think he did.

Q. You think he did?

A. Yes, sir.

Q. You think he got the witness Bowles?

A. No, he did not have anything to do with that.

Q. But you think he assisted in getting other witnesses?

A. He said he did not where Bowles was, to my best recollection.

Q. Then you went to England and then you came back and when you were in England you were in to see Mr. Pepys, among other things, in July, 1931?

A. Yes, sir; I did.

Q. You told Mr. Pepys, then, that you had been introduced to Mr. Wordsworth by Mr. Overmyer?

[fol. 222] A. I don't know whether I did or whether——

Q. Wordsworth——

A. I think that probably Mr. Pepys saw Mr. Overmyer's letter that was handed by me to Mr. Wordsworth. Mr. Wordsworth was in constant touch with Mr. Pepys and informed him constantly with regard to negotiations, so he must have known it.

Q. And at that time you told Mr. Pepys that Mr. Overmyer was going to co-operate with you?

A. No, I don't think that I did. I told Mr. Wordsworth of the talks that we had had about co-operation, and I told him I would like very much to have the liquidator intervene

in our suit, if he decided to take action, rather than bringing an independent suit.

Q. Well, at least, you testified yesterday that you discussed the fact with Mr. Wordsworth that you and Overmyer had discussed an association of some form, and the subject of division of fees had also been discussed?

A. I did.

Q. And Wordsworth was at that time the attorney for Pepys?

A. He was. And that may have come up in connection with my talk with Pepys. I don't say that, I don't remember that.

[fol. 223] Q. Then you went away on a holiday and Mr. Wordsworth sent out the letters to the shareholders and Mr. Wordsworth got the list of shareholders from Mr. Pepys, didn't he?

A. That is right, that is what he says. Have you the affidavit, Mr. Healy?

Mr. Healy: Yes.

Mr. Gilbert: That is right, that is what he says.

The Witness: I think that caused the statement——

Q. That is right.

A. —And Mr. Wordsworth has made a statement as to just what transpired.

Q. And Mr. Pepys at the time he furnished Mr. Wordsworth with that list of shareholders was a high officer in the British Government?

A. You have testified. I told you I did not know how he was appointed.

Q. Mr. McConnell says he was appointed by the Board of Trade and the Board of Trade is a part of the government?

A. I believe that is true, if he said so.

Q. And then they came in, the authorizations on one of these exhibits, appropriate exhibits, came in to Mr. [fol. 224] Wordsworth?

A. Surely.

Q. And Mr. Wordsworth advised you of them being sent in?

A. That is right.

Q. And you got the list of them from him, together with the number of shares held in the Rhodesia Vulcan Company?

A. I don't think I did then, but I think he sent those over. They were so voluminous they had to tabulate, and I think they said they wanted to keep those and make tables, and they would send them, Mr. Gilbert.

Q. Mr. Wordsworth, at that time when you discussed with him the remuneration and he said anything you wanted to give him was all right?

A. He said he would trust to my fairness.

Q. He did not sign the contract of January 6, did he?

A. He was not here. You see, I sent the third——

Q. He returned it unsigned, didn't he?

A. No, he did not.

Q. Did he keep it?

A. He kept our contract and said that that modification, said with that modification it was not understood that the liquidator should be bound in any way that was satisfac- [fol. 225] tory; he has kept his, and has confirmed the contract.

Q. Mr. Lee, there is a letter, part of the British Government's intervening petition, that is, Mr. Pepys' intervening petition, which letter from Mr. Wordsworth says he was not going to sign the contract?

A. No. I haven't the letter here but what he said in a letter was—would you let me see that letter?

Mr. Gilbert: I will show it to you, Mr. Lee. I have a copy.

Q. He said he did not understand the contract. It was inconsistent, and anything you wanted to give him was all right. It was going to be a gift to him; he was not going to sign it.

A. This (indicating) is my letter to Mr. Wordsworth.

Mr. Gilbert: They are all there together. One of them is from Mr. Wordsworth to you.

A. Oh, here it is.

The Court: Call the motion.

(And thereupon a short recess was taken.)

The Court: You may proceed in the case on trial.

Mr. Gilbert:

Q. Mr. Lee, I think we had reached the point in the de-
[fol. 226] velopment of the matter where you had returned to the United States from England and I was asking you about the fact that Mr. Wordsworth wrote a letter, after you sent him a copy of the contract signed by you and Mr. Overmyer, together with the letter, in which you said Mr. Overmyer was present when you were sending it off, I believe, and he said he did not care to sign it, anything you sent him, would give him, would be all right.

A. Here is what he said—this letter from Wordsworth, Murray, Johnson & Shaw—he said we had no knowledge that we were going to be made a party to any agreement—so far as I know he had no knowledge he was being made a party to any agreement—here it is: We always made it quite clear to Mr. Lee we would always be satisfied to take any share of his remuneration he thought we might be entitled to. That is very true.

When I was over there in 1931 he said, "I trust to your fairness. I know the reputation of your firm and anything that is a fair compensation and remuneration, I will be satisfied with that."

Q. Then you came back.

A. He said, "You will observe from our letter to Mr. Lee that we have amplified the position—that is the posi-
[fol. 227] tion Mr. Pepys took—to interpret the contract to mean by the contract we were circumscribing his rights to act independently, and he did not want to agree to that or be a party to it.

Q. And Mr. Wordsworth also said he had told Mr. Pepys he ought to employ you?

A. And that was entirely subsequent. That arose this way: Mr. Levinson had gone to Mr. Pepys——

Q. No, I mean in that letter there that came back right after the contract, that he ought to employ you, and if he did you would act independently of any other interests that you had?

A. Oh no, I never agreed to act independently.

Q. I don't say that you agreed to. Mr. Wordsworth says that he told Mr. Pepys that he ought to employ you and if he did so that you would act independently?

A. That was with regard to a trip that Mr. Levinson made to London to accomplish a possible settlement. Mr. Levinson saw Senator Deneen and myself and had a talk with us, talked about the extradition proceedings, and I told him that had nothing to do with our civil case in any way and I would not talk about it.

Q. Now, Mr. Levinson went——

[fol. 228] A. Wait a minute. He went to London, saw Mr. Pepys, made a proposition and said he was going to give Mr. Pepys a statement of what was in the banks here, but he did not do it. Mr. Pepys then saw Mr. Wordsworth and Mr. Wordsworth said I could represent him to the effect he wanted to get an itemized statement of what was in the banks. Mr. Levinson came to my office then and I told him what Mr. Pepys said, said I could represent Mr. Pepys in getting that information, and he said, "You don't think I am going to give you that now?" I said, "Mr. Pepys wants it and he says you agreed to give it to him." "Well," he says, "I won't do it.'

That was the size of that. I told Mr. Pepys I could represent him to the extent that I would see Mr. Levinson and try and get an itmeized statement from Mr. Levinson of the securities in the banks, would transmit that to Mr. Pepys and then Mr. Pepys could act as he was advised. But, I told him I objected to his trying to settle the case for our clients, and I did not think he should do that. If he wanted to settle for anybody he represented with Mr. Levinson, he could do it and I had nothing to say about it.

[fol. 229] Q. Now, on January 15, 1932, Mr. Wordsworth wrote a letter in which he said: "The official receiver discussed with me as to whether, having regard to this point of view as liquidator of the two companies it might not be desirable that he should employ some person to represent him in Chicago who would be able to approach the matter solely from the official receiver's standpoint and without being in any way concerned for any of the parties to the suit."

"I was very emphatic I saw no reason why the official receiver should not employ you to represent him, and I told him I was quite certain that in so far as you were acting on his behalf you would be prepared to take his instruc-

tions and be prepared to put in shape any proposal made by Factor the official receiver was willing to submit to the shareholders, even though you might not think the proposal satisfactory viewed from the standpoint of the proceedings as a whole.

At that time it was evident Mr. Wordsworth did not know Mr. Overmyer represented the official liquidator in Chicago?

A. Oh, yes, he had been informed that he represented the official liquidator, but Mr. Wordsworth, *Mr. Words-* [fol. 230] thought I could co-operate representing the official liquidator. Of course he knew that he was a representative of the official liquidator.

Q. Now, during the course of the——

A. Why, Mr. Gilbert——.

Mr. Gilbert: Yes.

A. Mr. Overmyer showed me cables from the liquidator saying that the liquidator did not object, or would consent to cooperation with me. The liquidator knew all about this, Wordsworth knew all about it, long before the January episode.

Q. During the course of the civil case, Mr. Lee, did you ever state to the Court, or did you ever tell us that Mr. Overmyer was interested in the civil case until after the settlement was signed?

A. You ask me—no, I don't think that I did.

Q. Is Mr. Overmyer attorney of record in this case?

A. He was not. He was present at practically every argument.

Q. But he did not participate in any argument, did he?

A. No, none.

Q. Then he did not participate with you in preparing for any argument?

[fol. 231] A. No.

Q. He merely attended?

A. He attended at his own solicitation.

Q. At his own solicitation. And Mr. McConnell sometimes attended the extradition proceedings, did he not?

A. Yes, and I attended the argument before Judge Carpenter. I wanted to find out what their position was going to be in that argument about the citizenship of Factor.

Q. It was quite proper for you to attend; you weren't participating in the extradition proceedings, you just attended?

A. I had no interest direct or indirect in the extradition proceedings; I was not interested in the proceeding, I don't know what the briefs are, haven't read them, don't know anything about it.

Q. The only thing that Mr. Overmyer did was to arrange, or furnish you this document, wasn't it?

A. I think he handed me this document, that is—I think he handed me that (indicating).

Q. Did he also hand you that document (indicating)?

A. I think he did; yes, sir. I am sure I had this when I went over to England June 1, 1932.

[fol. 232] The Court: These documents referred to are the testimony in the court, the extradition record, the court record.

Mr. Gilbert: Will you mark this as Factor Exhibit No. 1.

(The document so marked.)

The Court: Do you want all this in the record, Mr. Gilbert? Do you want the record in the extradition case in this case? There are several hundred pages and I cannot see what bearing it has.

Mr. Gilbert: I think I will avoid that.

The Court: I cannot see what possible value it has in connection with the services in this suit.

The Witness: We would like to put all of the exhibits in if you put that in.

Mr. Gilbert:

Q. I hand you Factor Exhibit No. 1, for identification, and ask you what it is, just briefly.

The Court: So far as the extradition case is concerned, the record of that case is in the court of appeals, so far as that is concerned this Court takes judicial notice of those records and if it is necessary to look it up, it is here.

[fol. 233] The Witness: I don't want to say to you that this document (indicating), was handed to me. Now, affidavits and statements were handed to me, and it may have been this document. When was this printed?

Mr. Gilbert:

Q. That was printed about 2 weeks after May 25.

A. Did he have any affidavits or statements outside of that?

Q. He had the originals from which these were printed.

A. I don't know, your Honor, what was furnished to me. I know statements and affidavits were furnished to me.

Q. At any rate, whatever was furnished by the British Government to him, he allowed you to take and investigate and anaylze, and from that you prepared your second amended bill of complaint.

The Court: Anybody could have had these papers.

Mr. Gilbert: These particular ones?

The Court: Yes, sure, any lawyer could have gotten this.

Mr. Gilbert: After they were introduced anyone could have gone to the Commissioner and looked at them, yes.

[fol. 234] The Court: Or when the case was in court, they have gotten this record.

Mr. Gilbert: When it became part of the Court's files, yes.

The Witness: I told him I was going to take a stenographer there and take everything that was introduced in evidence before Commissioner Walker. I said that I spoke to the Commissioner, Commissioner Walker, about it, and he said he could not prevent me from being there, from doing so, if there was room. His reply was, "I don't think it is necessary for you to do that. I have copies" I think, he said—"and I will furnish you them."

Q. And he did?

A. And he did; yes, sir.

Q. And at the same time he discussed this sharing of compensation?

A. I don't think that came up, Mr. Gilbert, as I told you, until later on when the question of whether he was going to intervene or file a separate suit was discussed. My best judgment is that I had those records, and we had a number of conferences, and that came up later.

Q. Mr. Lee, you said this morning it came up around the 23rd or 25th of May?

[fol. 235] A. No, you tried to get me to say if they came up on one of those two days, and I said on one of those early conferences. Isn't that true?

Mr. Gilbert: That is true.

Q. But, these matters were not printed up or introduced for a month after that day?

A. I don't know whether it was that document, but it was some statements and affidavits that purported to show the situation.

Q. Well, now, do you recall the occasion of the conflict of dates in taking depositions in England, and in setting down the extradition case for oral argument in the Circuit Court of Appeals?

A. I do.

Q. Did anyone tell us in your presence, or did you tell us then that Mr. Overmyer had no interest in the civil case?

A. No, I did not. Mr. Overmyer came to me and said that Judge Alschuler, as I remember, had told him that he is not going to set that down for oral argument at that time unless I would agree to put off the depositions in the civil case for a week or 10 days because you would have to [fol. 236] leave prior to the time of the oral argument.

Q. That is right.

A. Mr. Overmyer asked me if I would go down to the court and agree to that and I said that if you would agree I would agree to put it off; I first said I did not want to do it, I first said that I wanted to go ahead, and he said that he would like to have me go down. Then, we all met there, do you remember? And I said I had no objection if counsel could agree and the court wanted to set it.

Q. This is the fact, isn't it, that the date for taking the depositions was to begin on June 8, and that order was secured from Judge Woodward, and two days later Mr. Overmyer went in and asked to have the oral argument in the extradition case set down at a time when we were having to be on our way to London?

A. He told me you would have plenty of time to get to London?

Q. It was humanly possible, just barely?

A. That is the reason I did not want to put it over. I said they could get to London, all right, why put this over. They said they would be rushed, and so forth.

[fol. 237] Q. Were you in the room when Mr. Overmyer stated to the Circuit Court of Appeals that he had absolutely no interest in the civil case, had no connection with you or control over you, did not know anything about you, and he was not going to let you interfere with him.

A. That was not given over the radio, and I was on the ship going to Europe when you were in the Circuit Court of Appeals.

Q. No, no, this was the day we were in the Circuit Court of Appeals; we were in the Circuit Court of Appeals twice that day.

A. I wasn't there.

Q. I am asking you whether you were in there at the time he made that statement? We were in in the morning and you came in in the afternoon.

A. Didn't know a thing about. Nobody has ever told me that, I believe, until you told me several days when did you tell me?

Q. Some time ago. And I never heard Mr. Overmyer had any connection with this until Mr. McConnell told me in London after we settled it. So, we both had late information.

A. I was not in Court at that time and did not know he made any such statement.

[fol. 238] Q. About the conferences with Mr. Pepys I want to get the record straight on that. You recall at the first conference—Mr. Carter says it was the first—at any rate, it was after you and I had reached what we thought could be recommended to our respective clients, to wit, $1,050,000 and $300,000 in mortgages. That is the first time I ever saw Mr. Pepys with you, isn't it? It was after that time when we went into Mr. Pepys' office—you had been there before I arrived with Dr. Clark and Mr. Wordsworth and among you had gotten up a memorandum of what your recollection was as to what we both agreed we would submit to our clients, is that true?

A. I think that is true.

Q. Now, during the course of that conversation Mr. Levinson's name was mentioned, wasn't it?

A. Yes, it was.

Q. It was mentioned in connection with the question of whether Asbestos holdings trust should be included or not, wasn't it?

A. It was mentioned in that connection, and also in connection with Mr. Levinson's having said I would be entitled to 30 or 33 per cent, and you remarked that if all your associates had done a little less talking over there you would [fol. 239] be better satisfied.

Q. Who remarked that?

A. Somebody did. Did you know that you remarked about Stein, said you wished he never had come to London?

Mr. Gilbert: I did say that because I think his trip to London cost us 50,000 pounds.

A. I was not responsible for that. He went without my knowledge.

Q. All right. Now, to refresh your recollection, I know you don't want to repeat that conversation other than as it was, but Mr.——

A. Go ahead.

Q. —Carter and my recollection and yours is so vastly different than that, so I want you to recollect on it.

A. Yes.

Q. It was Stein that Pepys said had said that sometimes in cases of a contingent fee arrangement that 33⅓ per cent or even sometimes 50 per cent was allowed, and not Levinson——

A. Oh——

Q. (Continuing:) —and didn't I follow that up and say [fol. 240] it was probably true that in general situations of contingent fees, what is referred to as running down cases, and what I referred to as ambulance chasing cases, personal injury cases for the most part, and that in cases, percentage cases where there was a thousand dollars recovered or $1,500 recovered that sometimes they did take 50 per cent, but I did not think this was the kind of case for the basis of any one making a guess what a contingent fee should be; isn't that the fact?

A. I don't remember you using that language, but you are quite wrong in saying Levinson's name was not mentioned. Levinson——

Q. It was mentioned, but not in connection with your fee?

A. Pepys said to us that Levinson told him the fee I would be entitled to in connection with that settlement, he said, "You will have to pay 33 or 30 per cent", I don't know which, and Stein came over later and said the fee he will get will be 33 or 50 per cent, and Mr. Pepys said that influenced him, just as Mr. Langworthy said.

Q. What Pepys said was this—didn't Mr. Carter and I both say at that time that our clients regarded 20 per cent [fol. 241] as too high; didn't we say that?

A. No, that was before you had seen your clients. You said when we talked about the 20 per cent, Pepys said that

was satisfactory to him—isn't this right— you said then you were not concerned with that, that was all right with you, but you would have to confer with your clients. You went back and called up Mr. Factor and you said Factor would not agree to it and you even added something to that and said you did not agree with him, but that you had to abide by his instructions.

Mr. Gilbert: I did say the amount of your fees was no concern of mine.

The Witness: Surely.

Mr. Gilbert: I did say that.

The Witness: Surely.

Q. But at the next conference Mr. Carter said and I said my client thought it was too much.

A. Yes, you did.

Q. And Mr. Carter said he thought it was too much.

A. Oh, I don't think Mr. Carter said that. I think Mr. Carter was trying to get a settlement, here.

Q. At any rate——

A. If he takes the stand and says he said he thought it [fol. 242] was too much I would believe him, but I don't recollect that. You and Mr. Carter were trying to get through a settlement. You were telling me your client was presenting the settlement.

Q. I said it wasn't any concern of mine, I did not care what was paid to you, personally, and I don't——

A. Surely.

Q. It is no concern of mine.

The Court: What is the purpose of all this conversation which led up to the written agreement which is the only thing before the Court. It is all merged in that.

Mr. Langworthy: The statement of the witness on the stand that my client had stated 20 per cent was reasonable was probably stated for the purpose of influencing——

The Court (interposing): What difference does it make?

Mr. Langworthy: —this Court in fixing the fee, and I thought I would like to ask about it.

The Court: The Court is not interested unless he comes and testifies under oath; it is utterly immaterial.

[fol. 243] The Witness: Mr. Levinson admitted to me he said it to Mr. Pepys. I said, "Mr. Levinson, you told Mr. Pepys I was going to charge 33 per cent and I would get

it." He did not deny it. He said, "What are you going to charge?"

The Court: They agreed to leave it to the court?

Mr. Gilbert: That is all right, but in good faith to these British people I want to bring out if the statements of the witness which are accurate in his recollection commits them to a certain thing, I told them I would resist these allowances of 20 per cent.

The Court: The whole thing is merged in this agreement. It is for the Court to determine from the facts presented and the other evidence what is a reasonable fee on the basis specified in the contract.

Mr. Carter: May I add a word?

The Court: Yes.

Mr. Carter: As I understand Mr. Lee's testimony yesterday in response to Mr. Healy's questions, Mr. Lee is taking the position that Mr. Pepys consented to 20 per cent, and that he did it because Mr. Gilbert and I took the position in a conference that it was a fair fee.

The fact is quite different, and if necessary we will have [fol. 244] to take the stand and testify.

Mr. Lee: I did not mean to say that. I did not yesterday it was because of something you and Mr. Gilbert had said. I said it was because, partly what Mr. Levinson and Mr. Stein had told him, and I said further that at that conference neither you nor Mr. Gilbert objected. That is what I meant to say, and that is the fact.

Mr. Carter: It is not the fact.

Mr. Gilbert: I think that at the first conference we remained silent. It was the second one after we had conferred with Mr. Factor that we took the position.

Mr. Healy: I don't see that it makes any difference, if your Honor please, I mean, the position Mr. Gilbert and Mr. Carter took.

Mr. Gilbert: I don't think it makes a bit of difference what position we took except when I came away from England they thought I was going to resist an award of 20 per cent.

Mr. Healy: You have been superceded by Mr. Langworthy.

Mr. Gilbert: I don't want to be charged with being in default in the situation. That is all.

[fol. 245] The Witness: In justice to you and Mr. Pepys, when we were talking about 20 per cent there wasn't any agreement, if the Court please. It was simply a question of recommendation and Mr. Pepys was then going to submit it to all these people before he would be bound. He did not say to us that he was going to be bound without submitting it to all his clients. We all contemplated this matter, whatever it was, and believed a recommendation would be submitted to them just as the last recommendation was submitted to them.

He was not going to do anything behind their backs, as I understood.

Mr. Gilbert: Well, you had reported to you what happened when the matter was submitted to this Chancellor—of course, we won't go into that,—but, what happened before the Court.

The Witness: Yes.

Mr. Gilbert: And how this matter comes about.

The Witness: Yes.

Mr. Gilbert:

Q. Now, is there anything further that Mr. Overmyer did in this connection except furnish you these documents and confer with you from time to time?

A. The principal thing that he did, from my point of [fol. 246] view, and the only thing that he did, was—that wasn't of any tangible value—was to give me, to get me in communication with Mr. Wordsworth, the representative of the official liquidator. If he had not done that there would not have been any agreement made with Overmyer, but in view of the fact he introduced me to Wordsworth and Wordsworth was most valuable, I thought, in fairness to him, I would have to agree to this.

Q. You do know of your own knowledge that throughout the period from May 20 until this present moment Mr. Overmyer had been vigorously prosecuting the extradition case against John Factor?

A. He has told me that he has and he has told me—the records of the court show that he has, no question about it. I have always understood it. He has always pretended to me he was so busy in that that he could not help me.

Mr. Reporter, strike out "pretended."

Mr. Gilbert: That is all for the moment.

Mr. Healy: Just one question.

Mr. Langworthy: There is one question I should like to ask.

[fol. 247] Cross-examination.

By Mr. Langworthy:

Q. Mr. Lee, bringing your mind back to out-of-pocket money. The expenses of this proceeding have always been advanced and paid for by your clients; you have not had to advance any expenses?

A. Not a dollar.

Q. The penny on the pound that was contributed by the interveners and the solicitors over there had furnished all your out-of-pocket money?

A. Nothing was contributed by the solicitor over there, not a cent.

Q. Including the traveling expenses?

A. Oh, yes. This contract provides—we called attention to the fact that we had *occurred* expenses, traveling expenses, and the contract provides that we shall be reimbursed, that our clients shall be reimbursed the money that they advanced for out-of-pocket expenses.

Q. That out-of-pocket money has been advanced in the case by the clients?

A. Surely, every dollar.

Mr. Langworthy: I wanted to bring that out. That is all.

[fol. 248] Redirect examination.

By Mr. Healy:

Q. You, in answer to a question put to you on cross-examination testified about a letter which Mr. Levinson had sent to Mr. Pepys. Have you got a copy of that letter?

A. Well, I have a copy of a letter that Mr. Overmyer—all I know is that Mr. Overmyer brought over a letter that he said he had just received from Mr. Levinson, and I think I have the copy.

Q. That is the letter in which Mr. Levinson said Mr. Overmyer was the proper man to negotiate with and the proper man to represent the liquidator in this case.

A. Yes, as I remember he said he had been down taking the matter up with the government and Mr. Overmyer said he had represented—as I remember, he said Mr. Overmyer represented not only the liquidator, but he said he was representing all these parties; his point of view was he was representing them instead of me. He said that you are the proper man to do this. Your firm signed it, unless it is a forgery.

Mr. Healy: Have you any objection to giving us a copy of that letter?

The Witness: May I add one thing I overlooked. In [fol. 249] one of my talks with Mr. Pepys he said, "We do not have, Lee,"—that was prior to our conference—"contingent fees over here, but if I got in a complicated matter of this kind, if I had to employ leaders that I would have to get, I don't know, I think probably before I got through with it I would be out as much as you will get."

Mr. Langworthy: I don't think that is proper. Mr. Pepys is not here to state the surrounding circumstances.

Mr. Healy: He is here by counsel, if your Honor please.

The Witness: He just made it, incidentally.

Mr. Langworthy: I know, but he is not making a hostile attack on this fee, I am not asking for any unreasonable fee.

Mr. Healy: I don't know whether you would call it hostile or not, you are here objecting.

The Court: It may stand.

Mr. Healy: I think that is all at this time.

Mr. Langworthy: Just a question.

Recross-examination.

By Mr. Langworthy:

Q. Mr. Lee, you said that you thought the usual and customary charge for services that lawyers of your standing [fol. 250] would make would be $200 a day for services in this class of litigation, or this class of business, this class of services.

Now, would that be for court work?

A. I did not remember that I said that. I thought I said $200 a day, a very ample retainer, depending on the circumstances, but if it involved long,—if it involved work that would concentrate your attention on that, I would have

to say to my clients we would have to take into consideration what I was able to accomplish, the result——

Q. Yes, I understand.

A. Yes, but you did not include that last in your question.

Q. Oh.

A. I don't think that that would—I have made a charge of sometimes $150.

Q. Isn't there——

The Court (interposing): Sometimes you work for nothing?

The Witness: I work for nothing, yes, your Honor. One long case where I represented the building construction employeers association here, the carpenters, carpenter contractors association, I came pretty near working for nothing before I got through with it.

[fol. 251] Mr. Langworthy: Isn't there a distinction between office work, court work and out-of-town work?

A. Yes, usually there is a less charge for office work than court work, and a greater charge for out-of-town work than for office work.

Q. Isn't it a fact that $100 a day would be the usual and customary charge for office work, that would be a maximum, usual customary charge where you were going to get paid; you knew you were going to get paid, no uncertainty about it?

A. Well, I don't believe so. It depends upon the lawyers. I think you can get lawyers here for $10 a day.

Q. I am not talking about that class of lawyers.

A. I said I did not pretend to testify with regard to expert fees on that basis, and I don't intend to testify.

Q. Well, now, there isn't any purpose in having a retainer if you are certain you are going to get your per diem?

A. Oh, I want a retainer in advance frequently; most lawyers do. On large matters I frequently get a retainer in advance.

Q. Yes, but it is applied on your per diem?

A. No, no, not always at all, frequently not. The Rose [fol. 252] Hill Cemetary Company and Chicago Title & Trust Company where I represented them in an involved piece of litigation, they paid me a retainer and per diem.

and the retainer did not apply on the per diem; long involved litigation.

Q. Well, didn't Mr. Pepys also tell you in one of these conversations that a fee of anything like $260,000 in a matter of this kind would be totally unheard of in England?

A. No. What he said later, after Mr. Factor had objected to me was that the situation was changed, that he could not scarcely come in and recommend a fee if Mr. Factor was objecting. I don't know how he said that, but I got that impression from what he said, and said, I think, "Lee, in this country your fee would be a little smaller."

I said: "Mr. Pepys, you mean if the fee here was contingent it would be larger?" He said, "Well, we don't have a contingent fee and that ought to be taken into consideration." That is what he said. Or, he said words along that line. I don't pretend to remember just the words.

The Court: If this matter had arisen in England and the liquidator had brought suit, who would have paid the fees? Does anybody know?

[fol. 253] Mr. Gilbert: If the liquidator had brought the suit?

The Court: Yes, for these people.

Mr. Gilbert: Who would have paid the fee?

The Court: Who would have paid the fees?

Mr. Gilbert: It would have come out of a fund.

The Court: Do they have an appropriation for that purpose, would they have to take up a collection among the security holders and pay it that way?

Mr. Gilbert: I confess that I don't know.

The Witness: He said to me—I said to him, "Mr. Pepys, in case of these people losing their money over here and having nothing, what are you going to do about it if you haven't a contingent basis?" He said, "That is one thing we haven't. It is too bad." He said, "We just can't do it." He said that he had not any money himself that he could do anything with here.

The Court: Is his office a fee office or salary?

Mr. Gilbert: Salary.

The Witness: It is a salaried office. That is all I know, that is what he told me.

Mr. Gilbert: You know he had about 30,000 pounds in one receivership and 30,000 pounds in the Rhodesia receivership, and that he is keeping on top of this?

The Witness: Yes, and I said to him, "Mr. Peppys, will you contribute part of that fund" when it looked as if [fol. 254] our negotiations were falling down. "Will you contribute part of that fund? You are interested in this just as much as we are." "Well," he says, "I don't know about that. That is money in hand." And he would not give me an answer as to whether they would be able to contribute any part of it for expenses or not.

I said, "If not, these shareholders have got to get additional money." We were running out of funds. I told counsel that.

Mr. Healy: Are you through, Mr. Langworthy?

Mr. Langworthy: Just a minute.

Q. Now, then, Dr. Clark is in error when he writes me that

Mr. Healy: Object to what Dr. Clark may have written to Mr. Langworthy.

Mr. Langworthy: All right.

Mr. Healy: I don't know what he said, but I don't want to have to rebut it.

The Court: Is Mr. Clark your correspondent?

Mr. Langworthy: Yes.

The Court: Is that all.

Mr. Healy: Just one question.

Redirect examination.

By Mr. Healy:

[fol. 255] Q. Isn't it a fact, Mr. Lee, that lawyers of your standing at this bar for out-of-town work on a per diem basis charge anywhere from three hundred to five hundred dollars a day when they are away from their office and out of town?

A. I think they do, but I cannot say as to a maximum on the per diem out of town.

Q. All right.

A. I know what you would do, what Mr. Tenney would do and leading members of the bar, I think I do.

Mr. Healy:

Q. Mr. Butler, Mr. Carter and Mr. Gilbert and the other gentlemen.

Mr. Gilbert: Don't include me, I work pretty cheap.

The Witness: I say this that Mr. Gilbert has been in every hearing I have been in and he has worked very hard and I do not exclude him in talking about anybody.

Mr. Langworthy: I wanted to object to that question in its form.

Mr. Healy: The objection is good. I will withdraw it.

The Court: Strike out the question and answer.

Mr. Gilbert: These last conversations you related in response to Mr. Langworthy's question, conversations with [fol. 256] Pepys, none of them took place in the presence of Mr. Carter or myself?

The Witness: I don't think so, I think those were conversations before you came into the thing.

Mr. Gilbert: That is all.

Mr. Healy: Mr. Tenney has been here a day and a half. I would like to call him now.

The Court: Yes, I was about to say that I would not be able to return this afternoon until about half past three. I am going to a funeral and when we adjourn it will probably go over until tomorrow morning or at half past three this afternoon.

Mr. Healy: I don't think Mr. Tenney's testimony will take very long.

The Court: I will stay until 1 o'clock.

Mr. Healy: I will call Mr. Tenney.

(The witness was excused.)

Horace Kent Tenney, called as a witness herein and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Healy:

Q. Will you state your full name and your address? [fol. 257] A. My name is Horace Kent Tenney. I live at 640 Pine Street, Winnetka, and practice law here in Chicago.

Q. How long have you been practicing law in the City of Chicago?

A. Fifty-one years.

Q. During that period you have been continuously engaged in the practice of law at the Chicago bar?

A. Yes, sir.

Q. And you know generally the practitioners at the Chicago bar, I assume?

A. I did not get that.

Q. You know Mr. Lee, John H. S. Lee?

A. Yes, I know Mr. Lee.

Q. The witness that just left the stand. How long have you known Mr. Lee?

A. I should say it must be all of 25 years. I don't remember.

Q. Do you know his standing as a lawyer at this bar?

A. Yes, sir.

Q. What is his standing?

A. His standing is very good, he is regarded as a very good forceful trial lawyer, energetic and industrious in the [fol. 258] preparation and presentation of his cases.

Q. Now, you have been in court yesterday and today and have heard the testimony which Mr. Lee gave with reference to his services, to the services he rendered in this case, and what in his opinion the value of that service was?

A. Yes, sir.

Q. And assuming the correctness and the accuracy of the testimony which he gave and the facts and circumstances in this case as developed by his testimony, have you an opinion as to what would be a fair, reasonable, usual and customary charge for those services, for the services rendered by Mr. Lee upon a contingent basis?

A. Yes, sir.

Q. What is that opinion?

A. The contingent fees according to—have not an absolute fixed standard of percentage or amount because there is an inherent uncertainty. They depend upon the success and the amount of the success of the lawyer and therefore there isn't what you could call an absolute fixed standard. It varies with the character of the case and the amount of [fol. 259] work that may be seen in advance that may be involved, and with what you might call the intricacy of the case. I think that the fees on a percentage basis vary

from 25 per cent to 33 and sometimes they run higher than that. Sometimes I think they do run as high as 50 per cent.

If I may say, answering more directly your question about Mr. Lee's fees—I think the sum which he has stated, the percentage which he has stated of 20 per cent of the recovery, taking into consideration these other circumstances, is fair and reasonable.

Q. And in arriving at that conclusion and in expressing that opinion you have taken into consideration the complexity of the lawsuit and the service that he rendered, the time that he has given to it, the results that have been obtained as a result of the settlement, and all that?

A. Yes, and the fact that he has to pay out of that for assistance rendered to him by other counsel acting in the matter with them.

Mr. Healy: That is all, you may cross-examine.

Cross-examination.

[fol. 260] By Mr. Langworthy:

Q. Mr. Tenney, is there a usual and customary fee charged by lawyers at the Chicago bar upon a contingent basis for cases similar to this case?

A. Well, in the sense of a standardized fee, of a standardized percentage, there is not. It depends upon the case, its intricacy and the other elements that go to make up the value of the services.

Q. Isn't it usually customary where a fee is taken on a definite percentage to make the percentage smaller where the recovery is in large amounts, and the percentage larger as the recovery is smaller, in contingent cases?

A. Contracts, of course, vary. I suppose sometimes it is one percentage, if such an amount is recovered, and a different percentage if a different amount is recovered, but the whole thing is implied that it is contingent upon recovery, and therefore the increase and the benefit to the client by recovery of a large amount sometimes is represented by a reduction in the fee to the attorney, and sometimes it is not.

I would not say that there was a regular custom about that.

[fol. 261] Q. Now, in expressing your opinions you have taken into consideration, have you, Mr. Tenney, the fact

that Mr. Lee will pay 30 per cent of the fee to Mr. Overmyer and 20 per cent to the English solicitors?

A. Speak just a litle bit louder, Mr. Langworthy. I did not get the part of the sentence after "Mr. Overmyer."

Mr. Langworthy: I beg your pardon.

Q. In expressing your opinion of the 20 per cent, Mr. Tenney, you took into consideration, did you not, in this case that Mr. Lee will pay Mr. Overmyer 30 per cent and he will pay the English solicitors 20 per cent and he will pay Mr. McConnel 8 per cent of his 50 per cent?

A. Yes. I am not sure—I remembered about the percentage that was to go to the English solicitors, but I took into consideration he was to pay whatever he stated.

Q. Yes. Mr. Tenney, have you an opinion as to what would be the usual and customary fee for lawyers of Mr. Lee's standing to charge in a case of this kind if he was to be paid for services regardless of the outcome?

A. Well, I have not considered that, Mr. Langworthy. The question was put to me as being a contingent fee case, [fol. 262] and that always makes a difference. I have not gone over the matter in detail in that way at all.

Q. Isn't it, Mr. Tenney, the fact that if it is a contingent fee the only thing that affects it is the hazard of the recovery?

A. That is the main one, perhaps, from the standpoint of the lawyer and the main interest, perhaps, from the standpoint of the clients on account of the fact that the client hazards nothing and the lawyer hazards everything.

Q. But if the hazard in the case is very slight, the usual and customary percentage is smaller, isn't it?

A. Well, I don't know. Lawyers differ about it. Some charge a percentage in a case that would look to me to be one of comparative simplicity for an experienced lawyer, and they charge a percentage that sometimes to me is rather high. I don't get into that class of litigation. But, in other cases, the percentage charged is small, because they make a mistake in figuring the trouble that the case is going to involve. And this is one of those cases which was intricate way beyond the ordinary case and presented [fol. 263] difficulties which were very much in the way as hazards of the attorney getting fair compensation or any

compensation for his work no matter how long it might take, or how great it might be.

Q. Now, have you taken into consideration, Mr. Tenney, the fact that the case is over, that he recovered, the recovery is established, and that there was comparatively little time occupied in making proof, and that the lawyer now is through with the case, the services are ended and the matter of responsibility, the manner of the distribution of the fund is all transferred to the officials of the Kingdom of England?

A. Well, I thought that—it seemed to me the Court was going to decide the amount of this fee and act on the principles applicable to class suits, where an allowance is made by the Court after it has a fund, either within its possession, or subject to its distribution for the services of the counsel whose efforts have produced the fund. That is the way I look at it.

And, I did not understand the taking of evidence was a trivial matter, but quite the contrary, as it seemed to me, taking a large number of depositions, preparing the way [fol. 264] for depositions by ascertaining the facts, and all that.

Q. Yes, that is true.

A. And I regarded the case as one which, as put up to me, had resulted in success for those on whose behalf it was offered.

Q. That is right.

A. And had produced this fund of 1 million dollars and $300,000 in securities.

Q. But, you have read the second amended bill of complaint, or glanced through it, so you know the character of the case?

A. Yes, I read the bill and I read the answer of Mr. Factor. That was one, the one that was filed by Mr. Butler's firm. I read that.

Q. The only thing that is intricate or involved in the case is the matter of proving the facts, as stated in the bill, isn't it?

A. No, that is not so at all. It is a very intricate and difficult question of law whether there was a right of recovery in this as a class suit, and that attracted my attention at once, and I looked through it and I have had some

experience in that class of litigation, and it seemed to me [fol. 265] that the question of following the fund taken from a large number of different people at different times, being put into banks over here, so that there could be impressed upon those funds a trust in favor of these people was a question that was not at all free from doubt.

Q. As a legal question?

A. Yes.

Q. But, the intricate thing about it is the proof, isn't it?

A. Well, it is very intricate proof that is necessary to sustain the legal theory upon which the case was based.

Q. Is there a usual and customary fee charged by lawyers in this court at this bar for services similar to the services of Mr. Lee where there is no uncertainty about the payment of the fees?

Mr. Healy: I object to that, if your Honor, please. That is not this case. It is conceded by everybody that there was a very great uncertainty, and a recovery on the part of Mr. Lee could only be had in the event of success.

Mr. Langworthy: That is true.

Mr. Healy: But this is not a case where his fee was sure [fol. 266] in advance, and he knew where he was going to get it. If he failed in this case he would have gotten nothing. It might have taken years for him to eventually discover that he was not going to prevail, and for all that service during that time he was taking that risk and chance.

The Court: I did not get the question.

Mr. Langworthy: It was a similar question to the question I asked Mr. Lee whether there was a usual and customary charge for services of lawyers at this bar of Mr. Lee's standing, similar to the services performed by Mr. Lee in this case.

The Court: If, for instance, it was rendered for the First National Bank of Chicago.

Mr. Langworthy: Correct. That was the question.

The Court: He wants to know if there is a standard.

The Witness: I don't think there is a standard. It is different with different lawyers and with different cases.

Mr. Langworthy: Is there a customary charge?

The Court: The certainty of payment is one element among a large number of others?

The Witness: Yes, and certainty of payment and uncer- [fol. 267] tainty of payment are important elements.

Mr. Langworthy: That is true, but I was leaving that out.

Q. Isn't there a usual and customary fee that lawyers charge for their services by the day, of different classes of work?

A. No, I don't think so.

Q. What?

A. Not in the sense that it is $100 or $200, or a standardized sum per day. They differ and they differ according to the kind of case, I mean, one lawyer charges according to his experience——

Q. I was giving you the kind of case. I was saying in this kind of case. You had that in mind?

A. No, I don't think this is a case where it would run by the day unless there was a special agreement to that effect with no element in the agreement of a retainer in advance and of an increase over the per diem based upon the element of success.

[fol. 268] Q. Those things are taken into consideration, are usually taken into consideration, when a contract is made by a lawyer with his client, aren't they, that you have mentioned?

A. Yes, I think they usually are. If a client asks me what I am going to charge him, I generally tell him I don't think it is wise for either him or me to try and guess what the amount of work, because, to protect myself, I have to make the largest estimate, and that might, in view of the time occupied and the result, might be unfair to him, and, if they want to know, I make some estimate of the per diem retainer and the element of the result which is produced.

Q. Mr. Tenney, don't you think that, if this case were brought to a lawyer, and it was stated to him what the case was going to be about, what has happened, and if he was offered $100,000 for the services, for his services and all the services necessary to be performed to achieve the results, that the would feel as though it would be a very reasonable and usual and customary compensation for such service.

Mr. Healy: I object to that, because the question assumes counsel would know in advance what the services were going to be and the outcome.

The Court: Do you understand the question?

The Witness: Yes, I understand it as put.

The Court: Answer if you can.

[fol. 269] The Witness: I don't think it can be answered in that way, Mr. Langworthy.

Mr. Langworthy:

Q. Well, have you taken into account, Mr. Tenney, that this money is not going to one client, that it is going to between 2,000 and 2,500 clients.

A. Yes, being distributed among a class.

Q. Being distributed among a class who are very poor people and were unable to employ a lawyer and pay him, or agree to pay him, whether he was successful or not.

Mr. Healy: That question assumes that these clients are poor, if your Honor please.

Mr. Langworthy: We have some of Mr. Lee's testimony to that effect.

Mr. Healy: All right; I don't care.

The Witness: Yes, I took that into consideration. I remember it was stated they were unable to finance the litigation by paying fees. That element, Mr. Langworthy, is inherent in class suits of this kind, where there is a very large number of people whose interests are identical, and who are those embraced within the class.

Q. Have you taken into account that the case has not been tried in court in the sense that there is any hearing in court on the evidence, that the funds less the expenses are being transmitted to a public officer in England who, in [fol. 270] turn, is to transmit the funds to the clients?

A. Yes, I have taken into consideration the fact that the final result of getting the funds has been the result of negotiations and settlement between the interested parties.

Q. Have you taken into account that this fund is being transmitted to the English official receiver who, in turn, is then to distribute the money?

A. I assumed that anything sent to him would be distributed.

Q. And that any future claims or litigation with reference to that are of no concern to the plaintiff's counsel here?

A. Yes. I don't recall anything stated to me that showed he would have any responsibility, further responsibility, in connection with what the English officials did in distributing the fund.

The Court: Is that all, Mr. Langworthy? I would like to release Mr. Tenney before we adjourn. Are you through with Mr. Tenney?

Mr. Healy: Not quite. May I confer with Mr. Tenney just a minute about one aspect of the matter I have not talked about?

The Court: Yes. Are you going ahead this afternoon or tomorrow morning?

Mr. Healy: We are trying to shorten the thing up, if your Honor please. Just one question?

Redirect examination.

By Mr. Healy:

[fol. 271] Q. Mr. Tenney, in arriving at the conclusion that, under all the circumstances of this case, a 20 per cent of the recovery is a fair and reasonable fee, you gave consideration to the testimony given by Mr. Lee with reference to the arrangement that he had with Mr. Wordsworth and Mr. Overmyer?

A. Yes.

Q. And have considered what, if any, service of value Mr. Overmyer hay have rendered in that matter?

A. As stated by Mr. Lee.

Q. And you have taken into consideration the fact that Mr. Lee, under his contract has he assumed, is morally and legally bound to carry out the arrangement to pay these other solicitors in this case the amount he agreed upon?

A. Yes. And I looked at that, Mr. Healy, as showing more what work Mr. Lee did by conference with them in ascertaining the facts, and material, that would have to be at his disposal in the lawsuit; rather than the mere question of his obligation to them. But, I took into consideration the fact that whatever he succeeds in getting he will have to share with others, not that I think it increases the fair value of his services, but, considering the whole thing.

Q. In your opinion, Mr. Tenney, if Mr. Lee had rendered all the services in this matter, both here and abroad, and had not been obliged to associate other lawyers with him, he [fol. 272] would still be entitled to a 20 per cent of the amount recovered, and that would be a fair reasonable fee?

Mr. Langworthy: I don't think that question is in proper form.

The Court: Objection overruled.

[fol. 273] A. Yes, if one man does all the work, why, he is entitled to be paid. If he gets others to assist him, why, that is merely a matter as to how he arranges with them. My own firm and everybody's firm, I think, one man may do all the work but he divides the compensation with the other members.

Q. The true test is the value of the services rendered by whomsoever it may be rendered?

A. Yes.

Mr. Healy: That is all.

Cross-examination.

By Mr. Gilbert:

Q. Do you take the position that under these circumstances where a prosecutor is going to take 30 per cent award that that makes no difference in your judgment of the value of the work?

A. I don't think it makes any difference in the judgment of the value of Mr. Lee's work, I don't think the fact he was a prosecutor has affected my judgment.

Q. Did you read the contract, Mr. Tenney, of January 6, in which he, as I designate, as the prosecutor, agrees to co-operate in every possible way?

[fol. 274] A. By that, you mean Mr. Overmyer?

Q. Yes.

A. I don't think I have read this before, but I think I heard you or somebody read a part of it here. It would save time if you pointed out the place where it says that.

Mr. Gilbert: Right here (indicating).

A. I had not looked at that before, but I have it before me now.

Q. Would that change your answer?

A. No, I think not.

Q. If Mr. Lee performed all the services, and you attempted to arrive at the value—if he had to give up 30 per cent of it, then he is not being compensated sufficiently, is he?

A. Not if he has to give up 30 per cent as if it would get it all.

Q. Then you did take that 30 per cent into consideration in arriving at what would be a reasonable award to him, you considered that he had to give 50 per cent to somebody else in arriving at what was a reasonable award to him?

A. That is not so. I said I took into consideration the fact that he has assistance from others, and that he had [fol. 275] obligated himself to pay them.

Mr. Healy: The fact he had agreed to pay those assistants more than they were worth did not detract from the value of the services he rendered?

The Witness: I don't think so. It does not seem to me to be an element on the question of the value of his services.

Mr. Healy: That is all.

Mr. Gilbert: That is all.

(Witness excused.)

(Thereupon the further hearing of the above-entitled matter was adjourned until 10 o'clock a. m., September 23, 1932.)

[fol. 276]

FABER

v.

FACTOR et al.

Before Judge Wilkerson

September 23, 1932, at 10 o'clock a. m.

Met Pursuant to adjournment.

Present: Mr. Butler, Mr. Carter, Mr. Gilbert, Mr. Lee, Mr. Healy, Mr. Kearns, Mr. McConnell, Mr. Langworthy.

Mr. Kearns: If your Honor please, I think we are ready to go ahead this morning with the proof on behalf of the banks. I believe that is satisfactory to your Honor.

Mr. Healy: Shall we first have Mr. McConnell?

Mr. Lee: Let the banks go ahead first.

Mr. Kearns: I want the record show that answers have been filed on behalf of the Guardian Ad Litem, by Rella Cohen Factor, John Factor, Arthur M. Schwartz, Leah Fac-
[fol. 277] tor, Nathan Factor, Dena Goldstein, Gussie Mavergan, and Anna Factor.

No answer has been filed by Mr. Langworthy on behalf of Mr. Pepys or by Mr. Lee on behalf of his clients.

I would therefore like a default noted against Mr. Langworthy and Mr. Lee.

Mr. Healy: Mr. Lee, you are about to be defaulted. Is there any reason why you should not be?

Mr. Lee: I have not had a chance to examine this carefully, but a rule was entered yesterday, therefore we are in default, and default may be entered, I suppose, as far as we are concerned.

The Court: Very well, default Pepys and Lee for want of answer—to what?

Mr. Kearns: To the counter-claim of the trustees.

Just for Mr. Sullivan's record, the default against Mr. Lee should be against the plaintiff and the intervenors. Mr. Lee is attorney for those.

The Court: You better give the clerk a draft order.

Mr. Kearns: Yes, I will call Mr. Benjamin.

[fol. 278] Harry H. Benjamin, called as a witness herein, having been first duly sworn, was examined in chief by Mr. Kearns and testified as follows:

Q. Will you state your full name, please?

A. Harry H. Benjamin.

Q. And your residence?

A. West Chicago, Illinois.

Q. And your address, please?

A. 323 Fairview Avenue.

Q. Are you connected with the First Union Trust & Savings Bank?

A. Yes, sir.

Q. In what capacity?

A. Personal trust officer.

Q. How long have you been connected with that bank?

A. About 13 years.

Q. Is that concern authorized to hold and execute trusts today?

A. Yes, sir.

Q. And has it been over the period from November 3, 1930?

A. Yes, sir.

Q. Will you produce the files of the Trust Company an [fol. 279] original agreement between John Factor and the Trust Company?

A. Yes, sir.

Q. You are familiar with the signature of Mr. Factor?

A. Yes, sir.

Q. That (indicating) is his signature?

A. Yes, sir.

Q. And those are the signatures of the officers of the bank?

A. That is right.

Q. I have been trying to locate in the files, your Honor, a copy of the Trustees' answer, to which are attached photostats of these trusts. The clerk tells me he thinks that you have them, and Mrs. Ryder says she does not know quite where they are.

Now, the purpose was to identify certain exhibits attached——

The Court: We haven't them.

Mr. Kearns: I have here a true copy of that answer and I would like leave to substitute it in the files for the answer which is apparently missing. This is a copy of the answer of the Trustees that was filed on April 4 with the exhibits. May I file this?

[fol. 280] The Court: The original is probably in the clerk's office some place. I haven't had the papers.

Mr. Kearns: May this be considered as the original answer?

The Court: Yes.

Mr. Kearns:

Q. I hand you the answer of the Foreman State Trust & Savings Bank and First Union Trust & Savings Bank, as Trustees, and show you Exhibit C thereto; is that substantially a true copy of the Factor trust?

A. Yes, sir.

Mr. Kearns: I offer in evidence the original Factor Trust and ask that the Factor Trust, the Factor Trust with the First Trust, and ask that Exhibit C to the Trustees' answer be treated in lieu thereof for the purpose of the record.

The Court: Yes.

Mr. Kearns:

Q. Will you state whether you know what amount was received by the First Union Trust & Savings Bank under the terms of that trust?

A. One million dollars.

Q. That was received on or about November 3, 1930?

A. Yes, sir.

Q. I show you Exhibit D to the Trustees' answer filed herein on April 4, 1932, and ask if that is a true and correct list of the assets held by First Trust under that trust on [fol. 281] or about the date it bears?

A. Yes, sir.

Q. Were the purchases of those securities and other assets listed on Exhibit D that you have made in pursuance of the terms of the trust agreement, and with the approval and ratification of Mr. Factor?

A. Yes, sir.

Q. Will you tell the Court whether you have complied with the terms and the provisions of the trust agreement and with the statutes of the State of Illinois governing investments by trustees in making your investments in that trust since the filing of the Trustees' answer herein?

A. Yes, sir.

Q. Will you state whether any income has been distributed to anyone under the terms of that trust?

A. No, sir.

Q. Will you state whether on or shortly after August 31, 1932, First Trust commenced the liquidation of a portion of its securities and assets held in that trust, and whether Mr. Factor approved each such sale?

A. Yes, sir.

Q. Will you produce from the files of the Trust Company [fol. 282] an original instrument dated August 30, 1932, and executed by Mr. Factor?

A. Yes, sir.

Q. I hand you the document that you have produced. You are familiar with the signature of John Factor. Is that his signature?

A. Yes, sir.

Q. I hand you the original counter-claim of the Trustees filed in this cause September 21, 1932, and ask you if pages 37 and 38, therefore, designated "Exhibit, First Trust, Change of Beneficiary," is substantially a true copy of the document that you have so produced?

A. Yes, sir.

Mr. Kearns: I offer the original in evidence and ask that it be marked First Union Trust & Savings Bank Exhibit No. 2, and that the original trust agreement be marked First Union Trust & Savings Bank, Exhibit No. 1, and ask, please, to have the copy of Exhibit No. 2 printed in the counter-claim stand in lieu of the original record. May that be done, your Honor?

The Court: Yes. It may be admitted in evidence.

(Said documents so offered and received were thereupon marked First Union Trust & Savings Bank, Exhibits Nos. [fol. 283] 1 and 2, respectively, and are in words and figures as follows, to-wit:)

[fol. 284] First Union Bank Exhibit 1

Agreement made the 3rd day of November, 1930, between John Factor, of the City of Chicago, State of Illinois, hereinafter called the "Donor", and First Union Trust and Savings Bank, a corporation organized under the banking laws of the State of Illinois, hereinafter called the "Trustee"; witnesseth:

Whereas, the Donor desires to establish a trust upon the conditions and for the uses and purposes hereinafter set forth:

Now, therefore, in consideration of the sum of one dollar ($1.00), and other good and valuable considerations, to him in hand paid, the receipt whereof is hereby acknowledged, the Donor does by these presents transfer, assign, pay over and deliver to the Trustee the sum of one million dollars ($1,000,000) lawful money of the United States of America; the receipt whereof is hereby also acknowledged; to have and to hold said money, together with any additional property that may from time to time be added to the trust estate hereby created (all of which property is sometimes herein

referred to as the "trust estate") in trust nevertheless for the following uses and purposes, and upon the following terms that is to wit:

Article I

Period of Trust Hereby Created

1. The trusts hereby created shall continue for a period of twenty (20) years from the date of this agreement, during which said period, anything hereinafter contained to the contrary notwithstanding, the Trustee shall pay the entire net income from the trust estate to the Donor, if [fol. 285] living, and shall twenty (20) years after the date of this agreement, if the Donor be then living, pay the entire corpus of the trust estate to the Donor, thereby terminating this trust in its entirety.

In the event, however, that the Donor be not living twenty (20) years after the date of this agreement, the trusts hereby created shall continue for a period of twenty-one (21) years after the date of the death of the Donor, and provided further, that in the event the Donor be not living twenty (20) years after the date of this agreement and shall leave him surviving a child or children other than Jerome Factor and Alvin Jay Factor (said Jerome Factor and Alvin Jay Factor being the only children of the Donor now living), then all the trusts herein created shall continue and shall not expire until the youngest of such hereafter-born child or children, if any, shall have attained the age of twenty-one (21) years.

Whenever the expression "death of the Donor" is used in this agreement said expression shall always be construed to and shall mean the death of the Donor within twenty (20) years after the date of this agreement, and whenever the death of the Donor is referred to herein it shall always be construed to and shall mean the death of the Donor prior to the 3rd day of November, 1950.

Article II

Powers, Duties, Limitations and Expenses of Trustees

1. The Trustee shall take possession of all the trust estate, and shall (subject to the conditions hereinafter men- [fol. 286] tioned in paragraph 3 of this Article II hereof)

invest and reinvest the same in the name of the Trustee in bonds of the United States of America, or of any of the States of the United States of America, or in first mortgages upon real estate in any State of the United States of America, or in the bonds of any county, city or municipality in any State of the United States of America, or in the first mortgage bonds of any corporation of any State of the United States of America, upon which no default in payment of interest shall have occurred for a period of five years, being the securities defined under the term "investment of trustees" in and by Section 144 of Chapter 3 of the Cahill's Revised Statutes of the State of Illinois, 1929, meaning and intending hereby that said Trustee shall be authorized to make investments in such classes of securities defined by such statute as above mentioned only and shall not invest any of the funds in any other securities or in any bonds or securities in which cautious and intelligent persons do not invest their own money. The Trustee shall (subject to the conditions hereinbefore and hereinafter mentioned) have as wide latitude in the selection and making of said investments permitted hereunder as if it, as an individual, were investing its own funds.

The Trustee may (subject to the conditions hereinbefore in paragraph 1 and hereinafter in paragraph 3 of this Article II hereof provided) purchase from, or sell to, itself individually or any of its affiliated or subsidiary corporations any bonds, mortgages, or other securities at prices at which it deals with the public generally and shall not be accountable to the trust estate for any profit accruing from any such transaction.

[fol. 287] 2. The Trustee (subject, however, to the conditions hereinbefore in paragraph 1 of Article II provided and hereinafter mentioned in paragraph 3 of this Article II hereof) shall have full power and authority to manage, care for, improve, protect, control, deal with, sell, and otherwise in any way dispose of the trust estate, and each and every part thereof, as it would have if it were the absolute owner of the trust estate, and in so doing to enter into any and all agreements in respect of, and in connection with, the trust estate, and to exercise any rights or powers as bondholder of any corporation or otherwise whose securities may be in said trust estate, and to borrow money from time to time and pledge as security for the

payment thereof all, or any part, of the property at any time forming a part of the trust estate whenever, in the opinion of the Trustee, it shall be necessary and to the best interests of the trust estate so to do (subject always, however, to the conditions hereinafter in paragraph 3 of this Article II hereof provided); and in no case shall any party dealing with the Trustee in relation to the trust estate, or to whom the trust estate or any part thereof shall be conveyed, contracted to be sold, leased or mortgaged by the Trustee, be obliged to see to the application of any purchase money, rent, or money borrowed or advanced on the trust estate, or be obliged to see that the terms of this trust have been complied with; or be obliged to inquire into the necessity or expediency of any act of the Trustee, or be obliged or privileged to inquire into any terms of this Trust Agreement; and every deed, trust deed, mortgage, lease or other document or instrument executed by the Trustee in relation to the trust property shall be conclu- [fol. 288] sive evidence in favor of every person relying upon or claiming under any such conveyance, lease or instrument (a) that at the time of the delivery thereof the trust created by this agreement was in full force and effect; (b) that such conveyance or other instrument was executed in accordance with the trusts, conditions and limitations contained in this Trust Agreement or in any amendment hereof, and is binding upon all beneficiaries hereunder; and (c) that the Trustee was duly authorized and empowered to execute and deliver such deed, trust deed, mortgage, lease, or other document or instrument.

3. The rights, powers and privileges of investing, reinvesting, caring for, improving, protecting, dealing with, selling, or otherwise disposing of, managing, controlling, and/or distributing said trust estate, expressly conferred upon the Trustee under and by virtue of the terms and provisions of paragraphs 1 and 2 of this Article II hereof, shall be exercised by the Trustee only by and with the advice, consent and written approval of the Donor during the natural life of the Donor and after his death then only by and with the advice, consent and written approval of Otis F. Glenn, and/or Arthur L. Schwartz, both of the City of Chicago, Illinois, and/or their successor or successors, which said successor or successors shall be selected as hereinafter provided.

4. The Donor may from time to time, by instrument in writing delivered to the Trustee, authorize the said Otis F. Glenn and/or Arthur L. Schwartz to perform any of the acts of supervision of the management of the trust estate herein reserved to the Donor by virtue of the provisions of paragraph 3 of this Article II hereof, for such periods of [fol. 289] time as shall be designated in said writing by the Donor.

5. Neither the principal nor the income of the trust estate shall be liable for the debts of any beneficiary thereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law, or in equity, and no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in the principal of said trust estate, or the income produced thereby.

6. In making division of the corpus of the trust estate upon termination of the trusts herein created into shares under any provisions of this agreement, the Trustee may assign undivided interests in any assets of the trust estate to the several shares (subject to the conditions hereinbefore provided in paragraph 3 of this Article II hereof), and may make joint investments of funds in said shares and may, so long as the same can advantageously be done, hold the several shares as a common fund and divide the net income therefrom among the beneficiaries in accordance with the provisions of this agreement.

7. Distribution of the corpus trust estate, or any part thereof, may, in the Trustee's discretion (subject to the conditions hereinbefore provided in paragraph 3 of this Article II hereof) be made wholly or partly in kind. If it be necessary in making a distribution to place a valuation on the property, the Trustee may make such valuation, and it shall be final and conclusive on all persons.

8. The Trustee shall have power (subject to the conditions hereinbefore provided in paragraph 3 of this Article II hereof) to determine the mode in which expenses and taxes are to be borne between capital and income, and to [fol. 290] determine what moneys or things are to be treated as capital or income, which power shall include the power to determine the manner in which any part of the actual

income of any investment purchased at a premium or a discount shall be treated as capital or income. Every such determination, whether made upon a question actually raised, or implied from the acts or accounts of the Trustee, shall be conclusive and binding upon all persons.

9. No power or authority of the Trustee shall be exhausted by the use thereof; and each shall be continuing.

10. The Trustee and said Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors, shall be paid a reasonable compensation for their services, and may employ such agents and attorneys as are reasonably necessary. If, however, it shall become necessary or advisable to employ attorneys, then the law firm of Levinson, Becker, Glenn & Schwartz, and/or its successors; shall be employed. The reasonable expenses (including compensation and fees of the Trustee, Otis E. Glenn and/or Arthur L. Schwartz, and/or their successor or successors, and their respective agents, attorneys and/or solicitors), of administering the trusts shall be paid by the Trustee out of the income and/or principal of the trust estate.

Article III

Distribution of Income of Trust Estate

1. For and during a period of twenty (20) years from the date of this agreement or if he sooner die then during the natural life of the Donor, the Trustee shall pay the entire net income arising from the trust estate to the Donor, said income to be paid him on the 5th day of each calendar month.

[fol. 291] 2. From and after the death of the Donor, the Trustee shall, during the continuance of this trust and for the period of the duration of said trust as provided in Article I hereof, pay the net income from the trust estate to the following persons and in the following order and manner, to wit:

(a) To Leah Factor (mother of Donor), of Los Angeles, California, the sum of thirty-three dollars and thirty-three cents ($33.33) per week;

(b) To Dena Goldstein (sister of Donor), of Los Angeles, California, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(c) To Gussie Mavergan (sister of Donor), of Los Angeles, California, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(d) To Nathan Factor (brother of Donor), of Oakland, California, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(e) To Frank Factor (brother of Donor), of Los Angeles, California, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(f) To Bernard Factor, also known as Bernard Faudell (brother of Donor), of Hull, England, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(g) To Anna Cohen (mother-in-law of Donor), of Chicago, Illinois, the sum of thirty-three dollars and thirty-three cents ($33.33) per week;

(h) To William Cohen (brother-in-law of Donor), of Chicago, Illinois, the sum of thirty-three dollars and thirty-three cents ($33.33) per week.

The income payable in subparagraphs (a) to (h) of this paragraph 2 of Article III hereof (both inclusive) shall be payable on the first business day of each week.

3. In the event that any of said sisters or brothers or brother-in-law mentioned in paragraph 2 of this Article III hereof, dies prior to the termination of the trust as provided in and by Article I hereof, leaving no issue him or her surviving, then the income provided to be paid to said [fol. 292] sister, brother, and/or brother-in-law so dying without issue him or her surviving shall be and become a part of the income mentioned in paragraph 6 of this Article III hereof and shall be divided and paid out by the Trustee as hereinafter provided.

In the event that any of said sisters or brothers or brother-in-law mentioned in paragraph 2 of this Article III hereof die prior to the termination of the trust as provided in and by Article I hereof leaving issue him or her surviving, then the share of the income of the trust estate

herein provided to be paid to said brother, sister and/or brother-in-law shall be paid to his or her issue from time to time in being in equal shares per stirpes and not per capita.

In the event that any said sister, brother and/or brother-in-law mentioned in paragraph 2 of this Article III hereof die leaving issue but all of said issue shall die before the termination of this trust, then, upon the death of all of said issue, the income herein provided to be paid to said issue shall be and become a part of the residue and/or remainder of income mentioned in paragraph 6 of this Article III hereof and shall be divided and paid out by the Trustee as hereinafter provided in this Article III.

4. In the event that the Donor's mother (Leah Factor) and/or mother-in-law (Anna Cohen) die prior to the time of the termination of this trust, then the share of the income herein provided to be paid to them, respectively, shall be paid to the Donor's wife, Rella Cohen Factor, which income shall be in addition to the other income herein provided for said wife of the Donor.

5. In no event shall any share of the income herein in paragraphs 2 and 3 of this Article III hereof provided be [fol. 293] paid to any of the brothers, sisters, or brother-in-law of the Donor, or their issue, or to the mother or mother-in-law of the Donor for a period in excess of the duration of this trust, as provided in Article I hereof.

6. All of the rest, residue and remainder of the income, after providing for the payments set forth in subparagraphs (a) to (h) of paragraph 2 and mentioned in paragraps 3 and 4 of this Article III hereof, shall after the Donor's death and during the period of this trust, and if said respective beneficiaries be living, and as hereinafter provided, be set apart, paid out and expended by said Trustee (subject to the provisions hereinafter contained) as follows:

(a) Fifty per cent (50%) thereof to Rella Cohen Factor (wife of the Donor), of Chicago, Illinois, as hereinafter provided;

(b) Twenty-five per cent (25%) thereof to Jerome Factor (son of Donor), of Chicago, Illinois, as hereinafter provided;

(c) Twenty-five per cent (25%) thereof to Alvin Jay Factor (son of Donor), of Chicago, Illinois, as hereinafter provided.

7. The income payable to the wife of said Donor as set forth in this Article III hereof shall be paid her by said Trustee on the 5th day of each month.

8. (a) The income provided for said son of the Donor Jerome, in this Article III hereof, shall be paid out for the support, maintenance and education and for the best interests of said son, in such amounts and at such times (until said son shall have reached the age of twenty-one years) as the Trustee hereunder, with the advice, approval and written consent of said Otis F. Glenn or said Arthur L. Schwartz and or their successor or successors may deem advisable;

[fol. 294] (b) After said son, Jerome, shall have reached the age of twenty-one (21) years, said Trustee shall pay to him out of the income provided for him in this Article III hereof, the sum of one hundred dollars ($100) per week; said payments to be made in weekly installments on the first business day of each week and until said son shall have reached the age of twenty-three (23) years.

(c) After said son, Jerome, shall have reached the age of twenty-three (23) years and until he shall have reached the age of thirty (30) years, said Trustee shall (subject to the provisions relating to said son hereinafter contained) pay to him out of said residue of income mentioned in paragraph 6 of Article III hereof, the sum of one hundred fifty dollars ($150) per week; to be payable in weekly installments on the first business day of the week.

(d) From and after said son, Jerome, attaining the age of thirty (30) years, provided said son shall not have married before attaining the age of twenty-six (26) years, the Trustee shall pay over to him in monthly installments all of the income herein provided to be set apart for him under and by virtue of the terms of this Article III hereof.

(e) If said son, Jerome, shall have married before reaching the age of thirty (30) years, but said marriage having

occurred after said son has attained the age of twenty-six (26) years, then the Trustee, from and after said marriage, shall pay unto said son all of the income provided to be set apart for him under and by virtue of the terms of this Article III hereof, the same to be payable in monthly installments.

[fol. 295] (f) If said son, Jerome, shall have married before attaining the age of twenty-six (26) years, and shall have married some person of the same creed as that of said son, Jerome, or shall have married some person of another creed, and such last mentioned marriage shall have been approved by Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors, then and in that event the Trustee shall thereafter pay unto said son all of the income provided to be set apart for him under and by virtue of the terms of this Article III hereof; the same to be payable in monthly installments.

(g) In the event that said son, Jerome, shall have married some one of a different creed before he shall have attained the age of twenty-six (26) years without the approval of said Otis F. Glenn, or Arthur L. Schwartz, and/or their successor or successors, as hereinabove provided, then out of the income provided to be set apart for him under and by virtue of this Article III hereof, said Trustee shall pay to said son, if living, for the period of the duration of this trust, as provided in Article I hereof (instead of the provisions heretofore made with reference to such income), the sum of one hundred fifty dollars ($150) per week until the termination of this trust, payable on the first business day of each week, and the balance of said income set apart for said son shall be allowed to accumulate and shall be by said Trustee at the termination of this trust divided among the other than surviving children of the Donor, share and share alike, and shall at said time be paid over unto said other children in equal shares.

(h) When my said son, Jerome, shall have reached the age of twenty-six (26) years, provided he shall be single [fol. 296] or shall have married some person of the same creed, or some person of a different creed but said marriage shall have been approved by Otis F. Glenn or Arthur L. Schwartz and/or their successor or successors (as hereinabove provided), then, in addition to the weekly payments

herein provided to be made him, the Trustee shall pay to him any accumulated income from said share of income herein in this Article III hereof provided to be set apart for said son, Jerome.

(i) In the event of the death of said son, Jerome, at any time prior to the period provided for the payment to him of income herein, leaving a valid last will and testament and leaving a widow but no issue him surviving (whether said marriage be to one of the same creed or shall have been approved by said Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors, or otherwise) then the income herein provided for said son, Jerome, shall be and become a part of and shall be paid by the Trustee to his estate; and should he die at any such time intestate, leaving a widow but no issue him surviving, then such income shall be allowed to accumulate until the termination of this trust and the Trustee shall then divide the same equally among the then surviving children of the Donor or in case any other of the Donor's children shall have preceded said son, Jerome, in death, leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild or grandchildren, per stirpes and not per capita.

(j) In the event of the death of said son, Jerome, at any time prior to the period provided for the payment to him of income herein, leaving a valid last will and testament, [fol. 297] and leaving issue him surviving (whether said issue be of a marriage to one of the same creed or shall have been approved by said Otis F. Glenn and/or Arthur L. Schwartz or their successor or successors, or otherwise,) then the income herein provided for said son, Jerome, shall be and become a part of and shall be paid by the Trustee to his estate; and should he at any time die intestate leaving issue him surviving, then such income shall be allowed to accumulate until the termination of this trust and the Trustee shall then divide the same equally among the then surviving children of the Donor, or in case any other of the Donor's children shall have preceded said son, Jerome, in death, leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall

be paid to the Donor's said grandchild and/or grandchilden, per stirpes and not per capita.

(k) In the event of the death of said son, Jerome, at any time prior to the period provided for the payment to him of income herein leaving no surviving widow and no issue, the income provided to be paid to said son shall be allowed to accumulate until the termination of this trust, and shall be paid at the termination of this trust to the same person and/or persons who would receive, in the event of said son's death prior to the termination of the trust, that portion of the corpus of the trust estate hereinafter provided to be paid to said son, in case he be living at the termination of the trust, as hereinafter provided.

9. (a) In reference to the income provided in and by this Article III hereof, for the benefit of said son, Alvin Jay, said Trustee shall (subject to the provisions hereinafter contained) allow such income to accumulate until said [fol. 298] son shall have reached the age of twenty-one (21) years, and said Trustee shall set apart in a separate fund any of such accumulated income and shall pay the same to said son, Alvin Jay, as hereinafter provided.

(b) After said son, Alvin Jay, shall have reached the age of twenty-one (21) years, said Trustee shall pay him out of the income provided for him in this Article III hereof the sum of one hundred dollars ($100) per week, until he shall have reached the age of twenty-three (23) years, which sum shall be payable on the first business day of each week.

(c) After said son, Alvin Jay, shall have reached the age of twenty-three (23) years and until he shall become thirty (30) years of age, said Trustee shall (subject to the provisions hereinafter contained) pay him out of said residue of income mentioned in paragraph 6 of Article III hereof, the sum of one hundred and fifty dollars ($150) per week, which sum shall be payable on the first business day of each week.

(d) From and after said son, Alvin Jay, attaining the age of thirty (30) years, provided said son shall not have married before attaining the age of twenty-six (26) years, the Trustee shall pay over to said son in monthly installments all of the income herein provided to be set apart for

him under and by virtue of the terms of this Article III hereof.

(e) If said son, Alvin Jay, shall have married before reaching the age of thirty (30) years, but said marriage having occurred after said son has attained the age of twenty-six (26) years, then the Trustee from and after said marriage shall pay unto said son all of the income provided to be set apart for him under and by virtue of the terms of this Article III hereof; said payments to be made in monthly installments.

[fol. 299] (f) If said son, Alvin Jay, shall have married before attaining the age of twenty-six (26) years, and shall have married some person of the same creed as that of said son, Alvin Jay, or shall have married some person of another creed, and such marriage shall have been approved by the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living then by Otis F. Glen and/or Arthur L. Schwartz, and/or their successor or successors, then and in that event the Trustee shall thereafter pay unto my said son all of the income provided to be set apart for him under and by virtue of the terms of this Article III hereof; said payments to be made in monthly installments.

(g) In the event that said son, Alvin Jay, shall have married some one of a different creed before he shall have attained the age of twenty-six (26) years, without the approval of the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living, then without the approval of said Otis F. Glenn, or Arthur L. Schwartz, and/or their successor or successors, as hereinabove provided, then out of the income provided to be set apart for him under and by virtue of this Article III hereof, said Trustee shall pay to said son, if living, for the period of the duration of this trust, as provided in Article I hereof (instead of the provisions heretofore made with reference to such income), the sum of one hundred and fifty dollars ($150) per week, payable on the first business day of each week until the termination of the trust, and the balance of said income set part for said son shall be allowed to accumulate and shall be by said Trustee at the termination of this trust divided among the other then surviving chil-

dren of the Donor, share and share alike, and shall at said time be paid over unto said other children in equal shares.

[fol. 300] (h) When my said son, Alvin Jay, shall have reached the age of twenty-six (26) years, provided he shall be single or shall have married some person of the same creed, or some person of a different creed but said marriage shall have been approved by the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living, then by Otis F. Glenn or Arthur L. Schwartz and/or their successor or successors (as hereinabove provided) then, in addition to the weekly payments herein provided to be made him, the Trustee shall pay to him any accumulated income from said share of income herein in this Article III hereof provided to be set apart for said son, Alvin Jay.

(i) In the event of the death of said son, Alvin Jay, at any time prior to the period provided for the payment to him of income herein, leaving a valid last will and testament, and leaving a widow but no issue him surviving (whether said marriage be to one of the same creed or shall have been approved by the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living, then by said Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors, or otherwise), the income herein provided for said son, Alvin Jay, shall be and become a part of and shall be paid by the Trustee to his estate; and should he die at any such time intestate, leaving a widow but no issue him surviving, then such income shall be allowed to accumulate until the termination of this trust and the Trustee shall then divide the same equally among the then surviving children of the Donor, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death, leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent [fol. 301] would have received, if living, shall be paid to the Donor's grandchild or grandchildren per stirpes and not per capita.

(j) In the event of the death of said son, Alvin Jay, at any time prior to the period provided for the payment to him of income herein leaving a valid last will and testament and leaving issue him surviving (whether said issue be of

a marriage to one of the same creed or shall have been approved by the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living, then by said Otis F. Glenn and/or Arthur L. Schwartz, or their successor or successors, or otherwise), then all of the income herein provided for said son, Alvin Jay, shall be and become a part of and shall be paid by the Trustee to his estate; and should he at any such time die intestate, leaving issue him surviving, then such income shall be allowed to accumulate until the termination of this trust, and the Trustee shall then divide the same equally among the then surviving children of the Donor, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death, leaving a child and or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's said grindchild and or grandchildren, per stirpes and not per capita.

(k) In the event of the death of said son, Alvin Jay, at any time prior to the period provided for payment of income to him, leaving no surviving widow and no issue, the income provided to be paid to said son shall be allowed to accumulate until the termination of this trust, and shall be paid at the termination of this trust to the same person and or persons who would receive, in the event of said [fol. 302] son's death prior to the termination of the trust, that portion of the corpus of the trust estate hereinafter provided to be paid to said son, Alvin Jay, in case he be living at the termination of the trust, as hereinafter provided.

10. The income herein provided to be paid to the Donor's wife, Rella Cohen Factor, in and by the provisions of this Article III hereof shall be paid to her on the 5th day of each month.

11. In case of the death of the Donor's wife, Rella Cohen Factor, at any time prior to the termination of the trust herein created, leaving a valid last will and testament, then all of the income herein provided to be set apart and paid to her, if living, shall be and become a part of and shall be paid by the Trustee to her estate, and should she so die

intestate then the income herein provided to be set apart and paid to her shall be allowed to accumulate until the termination of this trust, and the Trustee shall then divide the same equally among the surviving children of the Donor or in case any other of the Donor's children shall have preceded said Rella Cohen Factor in death leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

12. In the event that the Donor leaves him surviving one, but not more than one other child (other than said Jerome and Alvin Jay) then in lieu of the provision respecting income made for Donor's wife and sons in paragraph 6 of Article III hereof, the Trustee shall (subject to the limitations hereinbefore provided) pay out and expend said income as follows:

[fol. 303] (a) Forty per cent (40%) thereof to the Donor's wife, Rella Cohen Factor;

(b) Twenty per cent (20%) thereof to the Donor's son, Jerome;

(c) Twenty per cent (20%) thereof to the Donor's son, Alvin Jay; and

(d) Twenty per cent (20%) thereof to said hereafter-born child;

said income allotted to such hereafter-born child to be used by my said Trustee by and with the approval of the mother of said hereafter-born child, in case said mother be then living, and in case said mother be then not living, then by and with the approval of Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors for the support, maintenance and education of said child until such child shall reach the age of twenty-one (21) years.

13. In the event that the Donor leaves him surviving more than one child (other than the Donor's said two sons, Jerome and Alvin Jay), then in lieu of the provisions respecting income made for the Donor's said wife and sons

in paragraph 6 of Article III hereof, the Trustee shall pay out and expend said income as follows:

(a) Thirty-three and one-third per cent (33⅓%) thereof to my said wife, Rella Cohen Factor:

(b) The balance of sixty-six and two-thirds per cent (66⅔%) thereof to be divided equally among all of the Donor's surviving children (subject to the limitations hereinbefore provided), the share of such income allotted for each hereafter-born child to be expended by the said Trustee by and with the approval and consent of the mother of said hereafter-born child in case said mother be then living, and in case said mother be then not living, then by and with the approval and consent of said Otis F. Glenn and/or Arthur L. Schwartz, or their successor or successors, for the support, education and maintenance of any such hereafter-born child until it shall have reached the age of twenty-one (21) years.

[fol. 304] 14. In case of the death of any hereafter-born child of the Donor before the termination of the trust as provided in Article I hereof, leaving a child or children him or her surviving, and leaving a valid last will and testament, the income herein provided for said hereafter-born child shall be and become a part of and shall be paid by the Trustee to his or her estate, and should he or she die intestate leaving issue him or her surviving, then said income shall be allowed to accumulate until the termination of this trust, and the Trustee shall then divide the same equally among the surviving children of the Donor, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild or grandchildren, per stirpes and not per capita.

15. In case of the death of any child of the Donor which may be hereafter born, said hereafter-born child leaving no widow or widower and no issue him or her surviving, then the income herein provided to be paid to said hereafter-born child shall be allowed to accumulate until the termination of this trust, and shall be paid at the termina-

tion of this trust to the same person or persons who would receive in the event of said hereafter-born child's death, prior to the termination of this trust, that portion of the corpus of the trust estate herein provided to be paid to said hereafter-born child in case he or she be living at the termination of the trust as herein provided.

16. In case of the death of any hereafter-born child of [fol. 305] the Donor, said hereafter-born child leaving a widow or widower, but no issue him or her surviving, and leaving a valid last will and testament, then the share of the income herein provided to be paid to said hereafter-born child shall be and become a part of and shall be paid by the Trustee to his or her estate, and should he or she die intestate, leaving a widow or widower but no issue him or her surviving then such income shall be allowed to accumulate until the termination of this trust and the Trustee shall then divide the same equally among the surviving children of the Donor, or in case of any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received if living shall be paid to the Donor's grandchild and/or grandchildren, per stirpes and not per capita.

Article IV

Distribution of Corpus of Estate

1. In the event that the Donor be living on the 3rd day of November, 1950 (twenty (20) years after the date of this agreement) the Trustee shall pay to the Donor the entire corpus of the trust estate and thereupon the trust hereby created shall terminate in its entirety.

Upon the termination of the trust after the death of the Donor, as provided in Article I hereof, the Trustee shall distribute the corpus of the estate together with any and all accumulated income (not hereinbefore disposed of) therefrom to the persons mentioned in subparagraphs (a) to (h) of paragraph 2 of Article III hereof, if such persons be living at that time, as follows:

[fol. 306] (a) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Leah Factor.

(b) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Gussie Mavergan;

(c) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Dena Goldstein;

(d) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Nathan Factor;

(e) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Frank Factor;

(f) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Bernard Factor;

(g) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said William Cohen;

(h) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Anna Cohen.

2. In the event that any of the Donor's said sisters or brothers or said brother-in-law be not living at the termination of the Trust as provided in Article I hereof, then the share of the corpus of the trust estate herein provided to be paid to said deceased brother, sister and/or brother-in-law shall be paid to his or her then living issue in equal shares, per stirpes and not per capita, and if any of said sisters or brothers or said brother-in-law shall have so died leaving no issue living at the termination of this trust, then the corpus of the trust estate herein provided to be paid to said deceased sister, brother and/or brother-in-law so dying without issue him or her surviving shall be and become a part of the residue and/or remainder of the corpus mentioned in paragraph 5 of this Article IV hereof,

and shall be divided and paid out by the Trustee as hereinafter provided in this Article IV hereof.

[fol. 307] 3. In the event that the mother-in-law of the Donor, Anna Cohen, be not living at the termination of the trust as provided in Article I hereof, then the share of the corpus of the trust estate herein provided to be paid to her shall be paid to the Donor's wife, Rella Cohen Factor.

4. In case the Donor's mother, Leah Factor, be not living at the termination of the trust as provided in Article I hereof, then the share of the corpus of the trust estate herein provided to be paid to her shall be paid to the Donor's wife, Rella Cohen Factor. The provision herein in paragraphs 3 and 4 of this Article IV hereof made for the Donor's wife shall be in addition to the fifty per cent (50%) of the corpus of such trust estate hereinafter provided to be paid to said wife.

5. The residue of the corpus of said trust estate shall (subject to the provisions hereinafter mentioned) be paid out by said Trustee as follows:

(a) Fifty per cent (50%) thereof to the Donor's wife, Rella Cohen Factor;

(b) Fifty per cent (50%) thereof to the Donor's two said sons, Jerome Factor and Alvin Jay Factor, in equal shares.

6. In the event of the death of the Donor leaving him then surviving another child (other than said Jerome and Alvin Jay) then in lieu of the provision made for said wife of the Donor in subparagraph (a) of paragraph 5 of this Article IV hereof, said Trustee shall turn over and deliver to said wife, forty per cent (40%) of the said residue of the corpus of said trust estate. And in lieu of said twenty-five per cent (25%) of the said residue of the corpus of the trust estate provided for each of the two sons of said Donor, in subparagraph (b) of paragraph 5 of this Article IV hereof, said Trustee shall turn over and deliver twenty per cent (20%) of said residue of said corpus of said trust estate to each of said two sons, Jerome and Alvin Jay, the remaining twenty per cent (20%) thereof to be held by [fol. 308] said Trustee for the benefit of said other hereafter-born child; and upon said hereafter-born child, if any, reaching the age of twenty-one (21) years said Trus-

tee shall pay over to it as its sole and absolute property, the said twenty per cent (20%) of the residue of the corpus of the said trust estate.

7. In the event of the death of the Donor leaving him then surviving more than one child or children in addition to said sons, Jerome and Alvin Jay, then in lieu of the provisions made for said Donor's wife of fifty per cent (50%) of the residue of the corpus of the trust estate in subparagraph (a) of paragraph 5 of this Article IV hereof, said Trustee shall pay over and deliver to said wife, thirty-three and one-third per cent (33⅓%) of said residue of the corpus of the trust estate; and in lieu of the provisions of twenty-five per cent (25%) each of the residue of the corpus of the trust estate each made in subparagraph (b) of paragraph 5 of this Article IV hereof for the two sons of the Donor, Jerome and Alvin Jay, the balance of said residue of the corpus of the trust estate consisting of sixty-six and two-thirds per cent (66⅔%) thereof (after providing for the wife of the Donor, as aforesaid) shall be by said Trustee distributed equally among all the children of the Donor who shall be living on the date of distribution, except that in no event shall any child receive his or her share of the corpus of the trust estate until he or she shall have attained the age of twenty-one (21) years.

8. In case of the death of the Donor's wife, Rella Cohen Factor, at any time prior to the termination of the trust herein created, leaving a valid last will and testament, then all of the corpus of the trust estate herein provided to be set apart and paid to her, if living shall be and become a [fol. 309] part of and shall be paid by the Trustee to her estate, and should she so die intestate then the corpus of the trust estate herein provided to be set apart and paid to her shall upon the termination of the trust be divided by the Trustee equally among the then surviving children of the Donor, or in case any of the Donor's children shall have preceded said Rella Cohen Factor in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

9. In case of the death of the Donor's son, Jerome, before the termination of the trust as provided in Article I hereof, leaving no widow and no issue him surviving, then and in that event the Trustee shall upon the termination of the trust divide the share of the corpus of said trust estate herein provided for said son among the Donor's then surviving child or children share and share alike, or in case any other of the Donor's children shall have preceded said son, Jerome, in death leaving a child and/or children him or her surviving, then the share of the residue of the corpus of the trust estate which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

10. In case of the death of the Donor's son, Jerome, before the termination of the trust, as provided in Article I hereof, leaving issue him surviving, and leaving a valid last will and testament, then the share of the corpus of said trust estate which said son would receive had he been living at said time shall be paid by the Trustee to his estate; or should he so die intestate leaving issue him surviving then [fol. 310] and in that event the Trustee shall, upon the termination of this trust, divide the share of the residue of the corpus of the trust estate herein provided for said son, Jerome, among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said son, Jerome, in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

11. In case of the death of the Donor's son, Jerome, before the termination of the trust, as provided in Article I hereof, leaving a widow surviving him, but no issue him surviving, and leaving a valid last will and testament, then the share of the corpus of the trust estate which said Jerome would receive had he been living at said time shall be and become a part of and shall be paid by the Trustee to his estate; or should he so die intestate leaving a widow him surviving, but no issue, then and in that event the Trustee, upon the termination of this trust, shall divide the share of the residue of the corpus of the trust estate herein provided

for said son, Jerome, among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said son, Jerome, in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

12. In case of the death of the Donor's son, Alvin Jay, before the termination of the trust as provided in Article I hereof, leaving no widow and no issue him surviving, then [fol. 311] and in that event the Trustee shall, upon the termination of this trust, divide the share of the corpus of said trust estate herein provided for said son among the Donor's then surviving child or children, share and share alike, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death leaving a child and/or children him or her surviving then the share of the residue of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

13. In case of the death of the Donor's son, Alvin Jay, before the termination of the trust, as provided in Article I hereof, leaving issue him surviving, and leaving a valid last will and testament, then the share of the corpus of said trust estate which said son would receive had he been living at said time shall be paid by the Trustee to his estate; or should he so die intestate leaving issue him surviving then and in that event the Trustee shall upon the termination of this trust divide the share of the residue of the corpus of the trust estate herein provided for said son, Alvin Jay among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

14. In case of the death of the Donor's son, Alvin Jay, before the termination of the trust, as provided in Article I

hereof, leaving a widow surviving him, but no issue him [fol. 312] surviving, and leaving a valid last will and testament, then the share of the corpus of the trust estate which said Alvin Jay would receive had he been living at said time shall be and become a part of and shall be paid by the Trustee to his estate; or should he so die intestate leaving a widow but no issue him surviving, then and in that event the Trustee shall, upon the termination of this trust, divide the share of the residue of the corpus of the trust estate herein provided for said son, Alvin Jay, among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

15. In case of the death of a hereafter-born child of the Donor before the termination of the trust, as provided in Article I hereof, leaving no widow or widower and no issue him or her surviving, then and in that event the Trustee shall, upon the termination of this trust, divide the share of the corpus of said trust estate herein provided for said hereafter-born child among the Donor's then surviving child or children share and share alike, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the residue of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

[fol. 313] 16. In case of the death of a hereafter-born child of the Donor before the termination of the Trust, as provided in Article I hereof, leaving issue him or her surviving, and leaving a valid last will and testament, then the share of the corpus of said trust estate which said hereafter-born child would receive had he or she been living at said time shall be paid by the Trustee to his or her estate; or should he or she so die intestate leaving issue him or her surviving, then and in that event the Trustee

shall, upon the termination of this trust, divide the share of the residue of the corpus of the trust estate herein provided for said hereafter-born child among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

17. In case of the death of a hereafter-born child of the Donor before the termination of the trust, as provided in Article I hereof, leaving a widow or widower him or her surviving, but no issue him or her surviving, and leaving a valid last will and testament, then the share of the corpus of the trust estate which said hereafter-born child would receive had he or she been living at said time shall be and become a part of and shall be paid by the Trustee to his or her estate; or should he or she so die intestate leaving a widow or widower but no issue him or her surviving, then and in that event the Trustee shall, upon the termination of this trust, divide the share of the residue of the corpus of the trust estate herein provided for said hereafter-born [fol. 314] child among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

18. If upon the termination of the trust as provided in Article I hereof, the Donor's wife, Rella Cohen Factor, be living but no surviving child or grandchildren of the Donor who would take under the terms of this agreement be then living, and none of said deceased children having died leaving a valid last will and testament and a widow or widower and/or issue him or her surviving, then and in that event the Trustee shall pay that portion of the corpus of the trust estate which would have been paid to said children and/or grandchildren had they or any of them been living at the termination of said trust, to the wife of the Donor, Rella Cohen Factor.

19. If upon the termination of the trust as provided in Article I hereof, the Donor's wife, Rella Cohen Factor, be not living, and there be no children and no grandchildren of the Donor who would take under the provisions of this agreement then living, and none of said deceased children having died leaving a valid last will and testament and a widow or widower and/or issue him or her surviving, then and in that event the Trustee shall distribute seventy-five per cent (75%) of the residue of the corpus of the trust estate mentioned and described in paragraph 5 of this Article IV hereof to any Jewish charity in Chicago, Illinois, to be [fol. 315] selected by said Trustee, and shall distribute and pay over the remaining twenty-five per cent (25%) thereof to any other charity or charities in the City of Chicago, Illinois, to be selected by said Trustee.

Article V

Amendments

1. The Donor notwithstanding any provisions herein contained expressly reserves the right at any time hereafter during the lifetime of said Donor to substitute any beneficiary in this trust agreement mentioned for any other beneficiary and to direct the Trustee hereunder to pay any share of income and/or corpus of the trust herein provided to be paid to any such beneficiary to such newly designated beneficiary in place and instead of to such beneficiary herein named, provided, however, that nothing herein contained shall be construed as giving the Donor (excepting always the right in the Donor to receive the income from the trust estate for a period of twenty (20) years after the date of this agreement, or if he sooner die, then during the whole of his natural life, and to receive the entire corpus of the trust estate twenty (20) years after the date of this agreement in the event that said Donor be then living (the right to designate himself and/or his estate as a beneficiary in the place and stead of any other herein named beneficiary.

2. Any direction or directions to the Trustee hereunder relating to such substitution of one beneficiary for another or relating to the payment of the share of income and/or corpus of one beneficiary to another hereunder, shall be in writing and shall be signed, sealed and acknowledged by the Donor and delivered to the Trustee hereunder.

[fol. 316] Article VI

Supervision of Trust Management

1. After the death of the Donor, Otis F. Glenn and/or Arthur L. Schwartz of the City of Chicago, Illinois, shall approve all investments of every kind and character which shall be made by the Trustee hereunder and the Trustee is hereby directed to make no investments of any of the trust estate after the date of the Donor's death, without first having obtained the approval in writing thereof of the said Otis F. Glenn and/or Arthur L. Schwartz, or their successor or successors.

2. The Trustee is further directed that after the death of the Donor, in all matters pertaining to the investing, reinvesting, caring for, improving, protecting, dealing with, selling or otherwise disposing of, managing, controlling and/or distributing the said trust estate, it shall first before performing any of said acts advise, consult with and secure the written approval of Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors to any such action to be taken by it in behalf of the trust estate.

3. In case of the death, resignation, inability and/or refusal to act of the said Otis F. Glenn in the supervision of the care, management, control, investment, reinvestment and distribution of the income and/or corpus of the trust estate as aforesaid, then and in that event all of said acts of supervision shall be exercised by Arthur L. Schwartz of the City of Chicago, Illinois.

4. In case of the death, resignation, inability and/or refusal to act of Arthur L. Schwartz in the supervision of the care, management, control, investment, reinvestment and distribution of the income and/or corpus of the trust [fol. 317] estate as aforesaid, then and in that event all of said acts of supervision shall be exercised by the said Otis F. Glenn of the City of Chicago, Illinois.

5. In case of the death, resignation, inability and/or refusal to act of both the said Otis F. Glenn and Arthur L. Schwartz in the supervision of the care, management, control, investment, reinvestment and distribution of the income and/or corpus of the trust estate as aforesaid, then and in that event the then acting Chief Justice of the Su-

preme Court of the State of Illinois shall appoint a successor or successors (not more than two in number, however) to act in the place and stead and perform the same duties hereunder as are provided to be performed by the said Otis F. Glenn and/or Arthur L. Schwartz, and in making such selection of a successor and/or successors, it is the desire of the Donor that said Chief Justice give preference to some member of the law firm of Levinson, Becker, Glenn & Schwartz, or its successor if there be a member or members of that firm, or its successor, who is or are proper and suitable, in the judgment of said Chief Justice, to assume and efficiently perform such duties.

6. The approval or disapproval of any marriage in this agreement mentioned shall be evidenced to the Trustee by a statement in writing delivered to the Trustee duly signed by Rella Cohen Factor and/or Otis F. Glenn, Arthur L. Schwartz and/or their successor or successors as the case may be.

7. Payment of income during the minority of any beneficiary hereunder, may, at the sole discretion of the Trustee, be made to any such minor beneficiary or to his or her lawful guardian, or to any person whom the Trustee shall have determined to be entitled to receive such payments. The Trustee shall be under no duty to see to the application [fol. 318] of such income after making payment thereof, and the lawful receipt of such minor beneficiary or of his or her lawful guardian, or of the person entitled to receive such payments, in the judgment of the Trustee, shall be sufficient discharge therefor to the Trusfee.

In witness whereof the Donor has subscribed his name and affixed his seal hereto, and the Trustee has caused this instrument to be executed by its duly authorized Vice President and attested by its Assistant Secretary, all on the day and year aforesaid.

John Factor, Donor. (Seal.) First Union Trust and Savings Bank, Trustee, by Albert C. Koch, Vice-President.

Attest:

C. W. Johnson, Assistant Secretary. (Seal.)

[fol. 318½] STATE OF ILLINOIS,
County of Cook, ss:

I, Robert S. Swaim, a notary public in and for the County of Cook and State of Illinois, do hereby certify that John Factor, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 3rd day of November, A. D. 1930.

Robert S. Swaim, Notary Public. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

I, Robert S. Swaim, a notary public in and for said County, in the State aforesaid, do hereby certify that Albert C. Koch, Vice President of First Union Trust and Savings Bank, and C. W. Johnson, Assistant Secretary of said Corporation, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such Vice President and Assistant Secretary, respectively, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument [fol. 319] as their own free and voluntary act, and as the free and voluntary act of said corporation, for the uses and purposes therein set forth, and the said Assistant Secretary did also then and there acknowledge that he, as custodian of the corporate seal of said corporation, did affix said corporate seal of said corporation to said instrument as his own free and voluntary act, and as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this 3rd day of November, A. D. 1930.

Robert S. Swaim, Notary Public.

[fol. 320] Mr. Kearns: If your Honor please, I am asking that the copy may stand in lieu of the original, for the record?

The Court: Yes.

Mr. Kearns:

Q. I ask you to produce from the files of the First Union Trust & Savings Bank a document executed by Rella Cohen Factor and John Factor, and constituting a request to make certain payments. Those are the signatures of John Factor and Rella Cohen Factor attached thereto?

A. Yes, sir.

Q. I hand you the counter-claim, the original counter-claim, of the trustees filed herein September 21, 1932, and ask if Exhibit First Trust settlement request appearing on pages 69 through 72 is substantially a true copy of the document that you have just presented, with the omission of the exhibits that are attached to the original?

A. Yes, sir.

Q. I will point out to you pages 43 to 66, inclusive, of the counter-claim, which commences, "Exhibit settlement agreement," and ask you if those are substantially true copies of the exhibits which are attached to the original that you produced?

[fol. 321] First Union Bank Exhibit 2

"First Trust Change of Beneficiary"

To First Union Trust and Savings Bank of Chicago, Illinois, as Trustee under a Trust Agreement Dated November 3, 1930, and Known on Its Records as Trust Number 13245

Whereas, under a Trust Agreement dated November 3, 1930, between the undersigned, John Factor, (therein called the Donor) and said First Union Trust and Savings Bank (therein called the Trustee) certain trusts were created as more specifically set forth in said Agreement;

And whereas, Article V of said Agreement reads as follows:

"Article V

Amendments

"1. The Donor notwithstanding any provisions herein contained expressly reserves the right at any time hereafter during the lifetime of said Donor to substitute any

beneficiary in this trust agreement mentioned for any other beneficiary and to direct the Trustee hereunder to pay any share of income and or corpus of the trust herein provided to be paid to any such beneficiary to such newly desig nated beneficiary in place and instead of to such beneficiary herein named, provided, however, that nothing herein con tained shall be construed as giving the Donor (excepting always the right in the Donor to receive the income from the trust estate for a period of twenty (20) years after the date of this agreement, or if he sooner die, then during the whole of his natural life, and to receive the entire corpus of the trust estate twenty (20) years after the date of this agreement in the event that said Donor be then living) the right to designate himself and or his estate as a beneficiary in the place and stead of any other herein name beneficiary.

"2. Any direction or directions to the Trustee hereunder relating to such substitution of one beneficiary for another or relating to the payment of the share of income and or corpus of one beneficiary to another hereunder, shall be in writing and shall be signed, sealed and acknowledged by the Donor and delivered to the Trustee hereunder."

And whereas, the undersigned desires to exercise the right reserved to him under said Article V of said Agree gent as hereinafter set forth.

Now, therefore, pursuant to and in exercise of the right reserved to him under said Article V of said Agreement, the undersigned as the Donor thereunder does hereby sub stitute his wife, Rella Cohen Factor, as the sole beneficiary under said Agreement for and in the place and stead of all the beneficiaries (including the undersigned) in said Agreement named or in any way defined, mentioned or described and who are now in being or may hereafter come into being, and the undersigned does hereby direct said Trustee, upon receipt of this Instrument, to pay out and distribute to the said Rella Cohen Factor, the entire corpus and undistributed net income of the Trust Estate under said Agreement after deducting therefrom and retaining such sums as may be required to satisfy and pay all costs, taxes, charges and expenses pertaining to said Trust Es tate, including reasonable compensation for the services of said Trustee.

In witness whereof the undersigned has hereunto set his hand and seal at Chicago, Illinois, this 30th day of August, 1932.

John Factor. (Seal.)

State of Illinois,
County of Cook, ss:

I, G. Gale Gilbert, Jr., a notary public in and for the County of Cook and State of Illinois, do hereby certify that John Factor, personally known to me to be the same person whose name is subscribed to the foregoing Instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said Instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30th day of August, A. D. 1932.

G. Gale Gilbert, Jr., Notary Public. (Seal.)

[fol. 322] A. Yes, sir.

Mr. Kearns: I offer First Union Trust & Savings Bank Exhibit No. 3 and ask that the copies thereof, and the copy of the exhibits attached to the counterclaim of the defendants stand in lieu of the originals?

The Court: It may be admitted.

(Thereupon said document so offered and received was marked First Union Trust & Savings Bank Exhibit No. 3, in evidence, and is in words and figures as follows, to-wit:)

[fol. 323] First Union Bank Exhibit 3

"First Trust Settlement Request"

September 17, 1932.

To First Union Trust and Savings Bank of Chicago, Illinois, as trustee under a trust agreement dated November 3, 1930, and known on its records as Trust No. 13245.

Gentlemen: On or about November 3, 1930, the undersigned, John Factor, established a trust with you under an agreement as of that date. On or about August 30, 1932, in pursuance of the power reserved by said John Factor in creating said trust he made the undersigned, Bella

Cohen Factor, the sole and only beneficiary of said trust.

John Factor has entered into a settlement agreement of certain controversies between himself and others involving the right and title to the funds, securities and assets held under the terms of said trust. A true copy of said settlement agreement is attached hereto and made a part hereof as if herein set forth in full.*

The undersigned, Rella Cohen Factor, as the sole and only beneficiary of said trust, hereby requests that you pay over and deliver from the assets of said trust the sum of $450,023.11, together with the notes secured by first mortgage trust deeds, as selected by John H. S. Lee and M. D. Follansbee, all in pursuance of the terms of said settlement agreement. The notes secured by mortgages on Chicago real estate so selected by Lee and Follansbee, and which are to be delivered by you in so far as they are included in the assets of the above mentioned trust, are described in the attached letter from Lee and Follansbee of even date herewith (all terms and provisions of said letter are satisfactory to both of us), and have a face value, including interest, of $299,953.88. I realize that the total amount of the selected notes secured by mortgages on Chicago real estate does not total exactly $300,000 as is provided by the terms of said settlement agreement, but I hereby authorize you to pay in cash one-half of the difference between the total face value of such notes, including interest, and $300,000.

In accordance with the terms of said settlement agreement said cash and notes are to be paid and delivered by you as follows:

(a) You are to pay to John H. S. Lee one-half of such sum as the United States District Court for the Northern District of Illinois, Eastern Division, in the case of Faber, et al. vs. Foreman-State Trust and Savings Bank, et al., in Equity No. 10538, may determine shall be in full reimbursement of all court costs of Arthur Traviss Faber and Adah Hayhurst, the original plaintiffs in that cause and the intervenors in that cause represented by Mr. Lee, all out-

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* NOTE.—Settlement agreement set out at pages 363-388 of this certificate and therefore not included at this point in certificate.

of-pocket expenses of John H. S. Lee and Ralph Wordsworth, and of said original plaintiffs and said intervenors and their other solicitors in England (including the traveling expenses of the plaintiffs, their solicitors and attorneys), and the expenses of taking depositions;

(b) You are to pay to John H. S. Lee one-half of such sum as said court in said cause may determine to be in full payment of all said original plaintiffs' and said intervenors' attorneys' fees; three-thirteenths of the amount so determined is to be in such of the notes described on the attached list of notes selected as may be agreed upon by said John H. S. Lee and M. D. Follansbee, or as may be directed by the order of said court in said cause; and ten-thirteenths of such sum is to be in cash;

(c) You are to pay to Tamplin, Joseph, Ponsonby, Ryde & Flux, of London, England, as solicitors for Arthur Traviss Faber and Millicent Elizabeth Faber one-half of the sum of £1425, a draft in said amount and so payable to be delivered to John H. S. Lee;

[fo. 324] (d) You are to pay to Tamplin, Joseph, Ponsonby, Ryde & Flux, of London, England, as solicitors for Adah Hayhurst, one-half of the sum of £1200, a draft in said amount and so payable to be delivered to John H. S. Lee;

(e) You are to pay and deliver to George Digby Pepys, as Senior Official Receiver in Companies Liquidation of the Kingdom of Great Britain, and as liquidator of Broad Street Press, Limited, of Vulcan Copper Mines, Limited, and of Rhodesia Border Mining Corporation, Limited, the entire balance of said sum of $450,000 in cash and notes secured by first mortgage deeds of trust as described in the said list attached hereto and in your possession, after deducting the payments and deliveries required by the terms of a, b, c and d above. Said payments and said deliveries so to be made to the British Receiver are directed to be paid, as to cash, by payment to the Bank of England (Law Courts Branch) for the credit of the Senior Official Receiver in Companies Liquidation, and as to the notes, by the delivery to M. D. Follansbee, the agent in Chicago of J. P. Morgan & Co., 23 Wall Street, New York, the bankers of said Senior Official Receiver.

After making said payments and deliveries and after deducting your reasonable fees and expenses and the fees and expenses of your attorneys and any other amounts directed to be paid to anyone else by said court, will you please pay over and deliver to the undersigned, Rella Cohen Factor, all remaining cash, securities and other assets of said trust.

Said settlement agreement provides for the payment of the sum of $1,000,000 in cash, $100,000 of which has already been paid. Of the balance, totaling $900,000, one-half is to be paid from your said trust, and the other one-half is to be paid from a similar trust of which Foreman-State Trust and Savings Bank is trustee. In addition to the payment of said $1,000,000 in cash said settlement agreement provides for the delivery of notes having a face value of $300,000, including accrued interest, at the time of delivery. Said settlement agreement likewise provides that three-thirteenths of the fee allowed to John H. S. Lee by the court shall be payable in mortgages. In the event the mortgages so selected, plus accrued interest thereon, do not total exactly $300,000 or in case the portion of such mortgages delivered to Lee do not total exactly three-thirteenths of the sum directed by said court to be paid to said Lee in full payment of all original plaintiffs' and intervenors' attorneys' fees, but total an amount slightly more or less than (a) said sum of $300,000 and/or (b) said three-thirteenths of said sum allowed by this court to John H. S. Lee in full payment of all original plaintiffs' and intervenors' attorneys' fees, then you are requested to make such minor adjustments by payments of cash to said British Receiver and/or to said John H. S. Lee as may be necessary to effect substantial compliance with the terms of said settlement agreement, and so that the total of cash plus face value of notes plus accrued interest paid and delivered by both you and Foreman-Trust under the terms of said settlement agreement aggregates exactly $1,200,000. One half of said cash adjustments are to be paid from each trust.

The undersigned, John Factor, executes this letter and joins in this request to indicate his approval of the entire transaction and as the settlor under your said trust.

Rella Cohen Factor, John Factor.

[fol. 325] Mr. Kearns: Do you know of any claims or possible claims against these funds and assets and securities in the hands of First Union Trust & Savings Bank, as trustee, under this exhibit, except those who are parties to this cause?

A. No, sir; I do not.

Mr. Kearns: I think that is all.

Is there any cross-examination?

The Court: Is there any cross-examination?

Mr. Gilbert: No, your Honor.

(Witness excused.)

[fol. 326] Louis W. Fisher, called as a witness herein, having been first duly sworn, was examined in chief by Mr. Kearns, and testified as follows:

Q. Will you state your full name, please?

A. Louis W. Fisher.

Q. Where do you reside?

A. Chicago.

Q. Just a little louder, please.

A. Chicago.

Q. And your address in Chicago?

A. 2529 Smalley Court.

Q. You are an officer of the Foreman State Trust & Savings Bank?

A. Yes, sir.

Q. And what position do you hold with that bank?

A. Vice-president.

Q. How long have you been in their employ, Mr. Fisher?

A. For 8 years.

Q. Is Foreman State Trust & Savings Bank authorized to hold and execute trusts today, and on November 3, 1930, and at all times over the intervening period?

A. Yes, sir.

Q. Will you produce from the files of the Foreman State Trust & Savings Bank the original Factor Trust instrument?

[fol. 327] A. Yes, sir.

Q. Are those signature- on page 35 the signatures of John Factor, and of the duly authorized officers of Foreman State Trust & Savings Bank?

A. Yes, sir.

Q. I hand you Exhibit A attached to the answers of Foreman Trust & First Trust, filed herein on or about April 4, 1932, and ask you if Exhibit A is substantially a true and correct copy of the agreement which you have produced?

A. Yes, sir.

Mr. Kearns: May I ask that this be marked Foreman Trust Exhibit No. 1, and I offer it, in evidence and ask that the copy attached to the answer of Foreman Trust filed here on April 4, 1932, stand in lieu of the original?

The Court: It may be so admitted.

(Thereupon the document so offered and received in evidence was marked Foreman Trust Exhibit No. 1, and is in words and figures as follows, to-wit:)

[fol. 328] FOREMAN TRUST EXHIBIT 1

File Copy

Office copy. Not to be removed from files. Foreman-State Trust and Savings Bank.

Agreement made the 3rd day of November, 1930, between John Factor, of the City of Chicago, State of Illinois, hereinafter called the "Donor," and Foreman-State Trust and Savings Bank, a corporation organized under the Banking laws of the State of Illinois, hereinafter called the "Trustee"; witnesseth:

Whereas, the Donor desires to establish a trust upon the conditions and for the uses and purposes hereinafter set forth:

Now, therefore, in consideration of the sum of one dollar ($1.00), and other good and valuable considerations, to him in hand paid, the receipt whereof is hereby acknowledged, the Donor does by these presents transfer, assign, pay over and deliver to the Trustee the sum of one million dollars ($1,000,000) lawful money of the United States of America; the receipt whereof is hereby also acknowledged; to have and to hold said money, together with any additional property that may from time to time be added to the trust estate hereby created (all of which property is sometimes herein referred to as the "trust estate") in trust nevertheless for the following uses and purposes, and upon the following terms, that is, to wit:

Article I

Period of Trust- Hereby Created

1. The trusts hereby created shall continue for a period of twenty (20) years from the date of this agreement, during which said period, anything hereinafter contained to the contrary notwithstanding, the Trustee shall pay the entire net income from the trust estate to the Donor, if [fol. 329] living, and shall twenty (20) years after the date of this agreement, if the Donor be then living, pay the entire corpus of the trust estate to the Donor, thereby terminating this trust in its entirety.

In the event, however, that the Donor be not living twenty (20) years after the date of this agreement, the trusts hereby created shall continue for a period of twenty-one (21) years after the date of the death of the Donor, and provided further, that in the event the Donor be not living twenty (20) years after the date of this agreement and shall leave him surviving a child or children other than Jerome Factor and Alvin Jay Factor (said Jerome Factor and Alvin Jay Factor, being the only children of the Donor now living), then all the trusts herein created shall continue and shall not expire until the youngest of such hereafter-born child or children, if any, shall have attained the age of twenty-one (21) years.

Whenever the expression "death of the Donor" is used in this agreement said expression shall always be construed to and shall mean the death of the Donor within twenty (20) years after the date of this agreement, and whenever the death of the Donor is referred to herein it shall always be construed to and shall mean the death of the Donor prior to the 3rd day of November, 1950.

Article II

Powers, Duties, Limitations and Expenses of Trustees

1. The Trustee shall take possession of all the trust estate, and shall (subject to the conditions hereinafter men- [fol. 330] tioned in paragraph 3 of this Article II hereof) invest and reinvest the same in the name of the Trustee in bonds of the United States of America, or of any of the States of the United States of America, or in first mort-

gages upon real estate in any State of the United States of America, or in the bonds of any county, city or municipality in any State of the United States of America, or in the first mortgage bonds of any corporation of any State of the United States of America, upon which no default in payment of interest shall have occurred for a period of five years, being the securities defined under the term "investment of trustees" in and by Section 144 of Chapter 3 of the Cahill's Revised Statutes of the State of Illinois, 1929, meaning and intending hereby that said Trustee shall be authorized to make investments in such classes of securities defined by such statute as above mentioned only and shall not invest any of the funds in any other securities or in any bonds or securities in which cautious and intelligent persons do not invest their own money. The Trustee shall (subject to the conditions hereinbefore and hereinafter mentioned) have as wide latitude in the selection and making of said investments permitted hereunder as if it, as an individual were investing its own funds.

The Trustee may (subject to the conditions hereinbefore in paragraph 1 and hereinafter in paragraph 3 of this Article II hereof provided) purchase from, or sell to, itself individually or any of its affiliated or subsidiary corporations any bonds, mortgages, or other securities at prices at which it deals with the public generally and shall not be accountable to the trust estate for any profit accruing from any such transaction.

[fol. 331] 2. The Trustee (subject, however, to the conditions hereinbefore in paragraph 1 of Article II provided and hereinafter mentioned in paragraph 3 of this Article II hereof) shall have full power and authority to manage, care for, improve, protect, control, deal with, sell, and otherwise in any way dispose of the trust estate, and each and every part thereof, as it would have if it were the absolute owner of the trust estate, and in so doing to enter into any and all agreements in respect of, and in connection with, the trust estate, and to exercise any rights or powers as bondholder of any corporation or otherwise whose securities may be in said trust estate, and to borrow money from time to time and pledge as security for the payment thereof all, or any part, of the property at any time forming a part of the trust estate whenever, in the opinion of the Trustee

it shall be necessary and to the best interests of the trust estate so to do (subject always, however, to the conditions hereinafter in paragraph 3 of this Article II hereof provided); and in no case shall any party dealing with the Trustee in relation to the trust estate, or to whom the trust estate or any part thereof shall be conveyed, contracted to be sold, leased or mortgaged by the Trustee, be obliged to see to the application of any purchase money, rent, or money borrowed or advanced on the trust estate, or be obliged to see that the terms of this trust have been complied with; or be obliged to inquire into the necessity or expediency of any act of the Trustee, or be obliged or privileged to inquire into any terms of this Trust Agreement; and every deed, trust deed, mortgage, lease or other document or instrument executed by the Trustee in relation [fol. 332] to the trust property shall be conclusive evidence in favor of every person relying upon or claiming under any such conveyance, lease or instrument (a) that at the time of the delivery thereof the trust created by this agreement was in full force and effect; (b) that such conveyance or other instrument was executed in accordance with the trusts, conditions and limitations contained in this Trust Agreement or in any amendment hereof, and is binding upon all beneficiaries hereunder; and (c) that the Trustee was duly authorized and empowered to execute and deliver such deed, trust deed, mortgage, lease, or other document or instrument.

3. The rights, powers and privileges of investing, reinvesting, caring for, improving, protecting, dealing with, selling, or otherwise disposing of, managing, controlling, and/or distributing said trust estate, expressly conferred upon the Trustee under and by virtue of the terms and provisions of paragraphs 1 and 2 of this Article II hereof, shall be exercised by the Trustee only by and with the advice, consent and written approval of the Donor during the natural life of the Donor and after his death then only by and with the advice, consent and writtten approval of Otis F. Glenn, and/or Arthur L. Schwartz, both of the City of Chicago, Illinois, and/or their successor or successors, which said successor or successors shall be selected as hereinafter provided.

4. The Donor may from time to time, by instrument in writing delivered to the Trustee, authorize the said Otis F. Glenn and/or Arthur L. Schwartz to perform any of the acts of supervision of the management of the trust estate herein reserved to the Donor by virtue of the provisions of paragraph 3 of this Article II hereof, for such periods of time as shall be designated in said writing by the Donor.

[fol. 333] 5. Neither the principal nor the income of the trust estate shall be liable for the debts of any beneficiary thereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law or in equity, and no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in the principal of said trust estate, or the income produced thereby.

6. In making division of the corpus of the trust estate upon termination of the trusts herein created into shares under any provisions of this agreement, the Trustee may assign undivided interests in any assets of the trust estate to the several shares (subject to the conditions hereinbefore provided in paragraph 3 of this Article II hereof), and may make joint investments of funds in said shares and may, so long as the same can advantageously be done, hold the several shares as a common fund and divide the net income therefrom among the beneficiaries in accordance with the provisions of this agreement.

7. Distribution of the corpus trust estate, or any part thereof, may, in the Trustee's discretion (subject to the conditions hereinbefore provided in paragraph 3 of this Article II hereof) be made wholly or partly in kind. If it be necessary in making a distribution to place a valuation on the property, the Trustee may make such valuation, and it shall be final and conclusive on all persons.

8. The Trustee shall have power (subject to the conditions hereinbefore provided in paragraph 3 of this Article II hereof) to determine the mode in which expenses and taxes are to be borne between capital and income, and to determine what moneys or things are to be treated as capi-
[fol. 334] tal or income, which power shall include the power to determine the manner in which any part of the actual income of any investment purchased at a premium

or a discount shall be treated as capital or income. Every such determination, whether made upon a question actually raised, or implied from the acts or accounts of the Trustee, shall be conclusive and binding upon all persons.

9. No power or authority of the Trustee shall be exhausted by the use thereof, and each shall be continuing.

10. The Trustee and said Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors, shall be paid a reasonable compensation for their services, and may employ such agents and attorneys as are reasonably necessary. If, however, it shall become necessary or advisable to employ attorneys, then the law firm of Levinson, Becker, Glenn & Schwartz, and/or its successors, shall be employed. The reasonable expenses (including compensation and fees of the Trustee, Otis F. Glenn and/or Arthur L. Schwartz, and/or their successor or successors, and their respective agents, attorneys and/or solicitors) of administering the trusts shall be paid by the Trustee out of the income and/or principal of the trust estate.

Article III

Distribution of Income of Trust Estate

1. For and during a period of twenty (20) years from the date of this agreement or if he sooner die then during the natural life of the Donor, the Trustee shall pay the entire net income arising from the trust estate to the Donor, said income to be paid him on the 5th day of each calendar month.

[fol. 335] 2. From and after the death of the Donor, the Trustee shall, during the continuance of this trust and for the period of the duration of said trust as provided in Article I hereof, pay the net income from the trust estate to the following persons and in the following order and manner, to wit:

(a) To Leah Factor (mother of Donor), of Los Angeles, California, the sum of thirty-three dollars and thirty-three cents ($33.33) per week;

(b) To Dena Goldstein (sister of Donor), of Los Angeles, California, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(c) To Gussie Mavergan (sister of Donor), of Los Angeles, California, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(d) To Nathan Factor (brother of Donor), of Oakland, California, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(e) To Frank Factor (brother of Donor), of Los Angeles, California, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(f) To Bernard Factor, also known as Bernard Faudell (brother of Donor), of Hull, England, the sum of sixteen dollars and sixty-six cents ($16.66) per week;

(g) To Anna Cohen (mother-in-law of Donor), of Chicago, Illinois, the sum of thirty-three dollars and thirty-three cents ($33.33) per week;

(h) To William Cohen (brother-in-law of Donor), of Chicago, Illinois, the sum of thirty-three dollars and thirty-three cents ($33.33) per week.

The income payable in subparagraphs (a) to (h) of this paragraph 2 of Article III hereof (both inclusive) shall be payable on the first business day of each week.

3. In the event that any of said sisters or brothers or brother-in-law mentioned in paragraph 2 of this Article III hereof, dies prior to the termination of the trust as provided in and by Article I hereof, leaving no issue him or [fol. 336] her surviving, then the income provided to be paid to said sister, brother, and/or brother-in-law so dying without issue him or her surviving shall be and become a part of the income mentioned in paragraph 6 of this Article III hereof and shall be divided and paid out by the Trustee as hereinafter provided.

In the event that any of said sisters or brothers or brother-in-law mentioned in paragraph 2 of this Article III hereof die prior to the termination of the trust as provided in and by Article I hereof leaving issue him or her surviving, then the share of the income of the trust estate herein provided to be paid to said brother, sister and/or brother-in-law shall be paid to his or her issue from time

to time in being in equal shares per stirpes and not per capita.

In the event that any said sister, brother and/or brother-in-law mentioned in paragraph 2 of this Article III hereof die leaving issue but all of said issue shall die before the termination of this trust, then, upon the death of all of said issue, the income herein provided to be paid to said issue shall be and become a part of the residue and/or remainder of income mentioned in paragraph 6 of this Article III hereof and shall be divided and paid out by the Trustee as hereinafter provided in this Article III.

4. In the event that the Donor's mother (Leah Factor) and/or mother-in-law (Anna Cohen) die prior to the time of the termination of this trust, then the share of the income herein provided to be paid to them, respectively, shall be paid to the Donor's wife, Rella Cohen Factor, which income shall be in addition to the other income herein provided for said wife of the Donor.

5. In no event shall any share of the income herein in paragraphs 2 and 3 of this Article III hereof provided be paid to any of the brothers, sisters, or brother-in-law of the [fol. 337] Donor, or their issue, or to the mother or mother-in-law of the Donor for a period in excess of the duration of this trust, as provided in Article I hereof.

6. All of the rest, residue and remainder of the income, after providing for the payment set forth in subparagraphs (a) to (h) of paragraph 2 and mentioned in paragraphs 3 and 4 of this Article III hereof, shall after the Donor's death and during the period of this trust, and if said respective beneficiaries be living, and as hereinafter provided, be set apart, paid out and expended by said Trustee (subject to the provisions hereinafter contained) as follows:

(a) Fifty per cent (50%) thereof to Rella Cohen Factor (wife of the Donor), of Chicago, Illinois, as hereinafter provided;

(b) Twenty-five per cent (25%) thereof to Jerome Factor (son of Donor), of Chicago, Illinois, as hereinafter provided;

(c) Twenty-five per cent (25%) thereof to Alvin Jay Factor (son of Donor), of Chicago, Illinois, as hereinafter provided.

7. The income payable to the wife of said Donor as set forth in this Article III hereof shall be paid her by said Trustee on the 5th day of each month.

8. (a) The income provided for said son of the Donor, Jerome in this Article III hereof, shall be paid out for the support, maintenance and education and for the best interests of said son, in such amounts and at such times (until said son shall have reached the age of twenty-one years) as the Trustee hereunder, with the advice, approval and written consent of said Otis F. Glenn or said Arthur L. Schwartz and/or their successor or successors, may deem advisable.

[fol. 338] (b) After said son, Jerome, shall have reached the age of twenty-one (21) years, said Trustee shall pay to him out of the income provided for him in this Article III hereof, the sum of one hundred dollars ($100) per week; said payments to be made in weekly installments on the first business day of each week and until said son shall have reached the age of twenty-three (23) years.

(c) After said son, Jerome, shall have reached the age of twenty-three (23) years and until he shall have reached the age of thirty (30) years, said Trustee shall (subject to the provisions relating to said son hereinafter contained) pay to him out of said residue of income mentioned in paragraph 6 of Article III hereof, the sum of one hundred fifty dollars ($150) per week; to be payable in weekly installments on the first business day of the week.

(d) From and after said son, Jerome, attaining the age of thirty (30) years, provided said son shall not have married before attaining the age of twenty-six (26) years, the Trustee shall pay over to him in monthly installments all of the income herein provided to be set apart for him under and by virtue of the terms of this Article III hereof.

(e) If said son, Jerome, shall have married before reaching the age of thirty (30) years, but said marriage having occurred after said son has attained the age of twenty-six

(26) years, then the Trustee, from and after said marriage, shall pay unto said son all of the income provided to be set apart for him under and by virtue of the terms of this Article III hereof, the same to be payable in monthly installments.

[fol. 339] (f) If said son, Jerome, shall have married before attaining the age of twenty-six (26) years, and shall have married some person of the same creed as that of said son, Jerome, or shall have married some person of another creed, and such last mentioned marriage shall have been approved by Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors, then and in that event the Trustee shall thereafter pay unto said son all of the income provided to be set apart for him under and by virtue of the terms of this Article III hereof; the same to be payable in monthly installments.

(g) In the event that said son, Jerome, shall have married some one of a different creed before he shall have attained the age of twenty-six (26) years without the approval of said Otis F. Glenn, or Arthur L. Schwartz, and/or their successor or successors, as hereinabove provided, then out of the income provided to be set apart for him under and by virtue of this Article III hereof, said Trustee shall pay to said son, if living, for the period of the duration of this trust, as provided in Article I hereof (instead of the provisions heretofore made with reference to such income), the sum of one hundred fifty dollars ($150) per week until the termination of this trust, payable on the first business day of each week, and the balance of said income set apart for said son shall be allowed to accumulate and shall be by said Trustee at the termination of this trust divided among the other then surviving children of the Donor, share and share alike, and shall at said time be paid over unto said other children in equal shares.

(h) When my said son, Jerome, shall have reached the age of twenty-six (26) years, provided he shall be single or [fol. 340] shall have married some person of the same creed, or some person of a different creed but said marriage shall have been approved by Otis F. Glenn or Arthur L. Schwartz and/or their successor or successors (as hereinabove provided), then, in addition to the weekly payments herein

provided to be made him, the Trustee shall pay to him any accumulated income from said share of income herein in this Article III hereof provided to be set apart for said son, Jerome.

(i) In the event of the death of said son, Jerome, at any time prior to the period provided for the payment to him of income herein, leaving a valid last will and testament and leaving a widow but no issue him surviving (whether said marriage be to one of the same creed or shall have been approved by said Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors, or otherwise) then the income herein provided for said son, Jerome, shall be and become a part of and shall be paid by the Trustee to his estate; and should he die at any such time intestate, leaving a widow but no issue him surviving, then such income shall be allowed to accumulate until the termination of this trust and the Trustee shall then divide the same equally among the then surviving children of the Donor or in case any other of the Donor's children shall have preceded said son, Jerome, in death, leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild or grandchildren, per stirpes and not per capita.

(j) In the event of the death of said son, Jerome, at any time prior to the period provided for the payment to him of income herein, leaving a valid last will and testament, and leaving issue him surviving (whether said issue be of a [fol. 341] marriage to one of the same creed or shall have been approved by said Otis F. Glenn and/or Arthur L. Schwartz or their successor or successors, or otherwise) then the income herein provided for said son, Jerome, shall be and become a part of and shall be paid by the Trustee to his estate; and should he at any time die intestate leaving issue him surviving, then such income shall be allowed to accumulate until the termination of this trust and the Trustee shall then divide the same equally among the then surviving children of the Donor, or in case any other of the Donor's children shall have preceded said son, Jerome, in death, leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be

paid to the Donor's said grandchild and/or grandchildren, per stirpes and not per capita.

(k) In the event of the death of said son, Jerome, at any time prior to the period provided for the payment to him of income herein leaving no surviving widow and no issue, the income provided to be paid to said son shall be allowed to accumulate until the termination of this trust, and shall be paid at the termination of this trust to the same person and/or persons who would receive, in the event of said son's death prior to the termination of the trust, that portion of the corpus of the trust estate hereinafter provided to be paid to said son, in case he be living at the termination of the trust, as hereinafter provided.

(9) (a) In reference to the income provided in and by this Article III hereof, for the benefit of said son, Alvin Jay, said Trustee shall (subject to the provisions hereinafter contained) allow such income to accumulate until said son shall have reached the age of twenty-one (21) years, [fol. 342] and said Trustee shall set apart in a separate fund any of such accumulated income and shall pay the same to said son, Alvin Jay, as hereinafter provided.

(b) After said son, Alvin Jay, shall have reached the age of twenty-one (21) years, said Trustee shall pay him out of the income provided for him in this Article III hereof the sum of one hundred dollars ($100) per week, until he shall have reached the age of twenty-three (23) years, which sum shall be payable on the first business day of each week.

(c) After said son, Alvin Jay, shall have reached the age of twenty-three (23) years and until he shall become thirty (30) years of age, said Trustee shall (subject to the provisions hereinafter contained) pay him out of said residue of income mentioned in paragraph 6 of Article III hereof, the sum of one hundred and fifty dollars ($150) per week, which sum shall be payable on the first business day of each week.

(d) From and after said son, Alvin Jay, attaining the age of thirty (30) years, provided said son shall not have married before attaining the age of twenty-six (26) years, the Trustee shall pay over to said son in monthly installments all of the income herein provided to be set apart for

him under and by virtue of the terms of this Article III hereof.

(e) If said son, Alvin Jay, shall have married before reaching the age of thirty (30) years, but said marriage having occurred after said son has attained the age of twenty-six (26) years, then the Trustee from and after said marriage shall pay unto said son all of the income provided to be set apart for him under and by virtue of the terms of this Article III hereof; said payments to be made in monthly installments.

[fol. 343] (f) If said son, Alvin Jay, shall have married before attaining the age of twenty-six (26) years, and shall have married some person of the same creed as that of said son, Alvin Jay, or shall have married some person of another creed, and such marriage shall have been approved by the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living then by Otis F. Glenn and/or Arthur L. Schwartz, and/or their successor or successors, then and in that event the Trustee shall thereafter pay unto his said son all of the income provided to be set apart for him under and by virtue of the terms of this Article III hereof; said payments to be made in monthly installments.

(g) In the event that said son, Alvin Jay, shall have married some one of a different creed before he shall have attained the age of twenty-six (26) years, without the approval of the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living, then without the approval of said Otis F. Glenn, or Arthur L. Schwartz, and/or their successor or successors, as hereinabove provided, then out of the income provided to be set apart for him under and by virtue of this Article III hereof, said Trustee shall pay to said son, if living, for the period of the duration of this trust, as provided in Article I hereof (instead of the provisions heretofore made with reference to such income) the sum of one hundred and fifty dollars ($150) per week, payable on the first business day of each week until the termination of the trust, and the balance of said income set apart for said son shall be allowed to accumulate and shall be by said Trustee at the termination of this trust divided among the other then sur-

viving children of the Donor, share and share alike, and shall at said time be paid over unto said other children in equal shares.

[fol. 344] (h) When my said son, Alvin Jay, shall have reached the age of twenty-six (26) years, provided he shall be single or shall have married some person of the same creed, or some person of a different creed but said marriage shall have been approved by the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living, then by Otis F. Glenn or Arthur L. Schwartz and/or their successor or successors (as hereinabove provided) then, in addition to the weekly payments herein provided to be made him, the Trustee shall pay to him any accumulated income from said share of income herein in this Article III hereof provided to be set apart for said son, Alvin Jay.

(i) In the event of the death of said son, Alvin Jay, at any time prior to the period provided for the payment to him of income herein, leaving a valid last will and testament, and leaving a widow but no issue him surviving (whether said marriage be to one of the same creed or shall have been approved by the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living, then by said Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors, or otherwise), the income herein provided for said son, Alvin Jay, shall be and become a part of and shall be paid by the Trustee to his estate; and should he die at any such time intestate, leaving a widow but no issue him surviving, then such income shall be allowed to accumulate until the termination of this trust and the Trustee shall then divide the same equally among the then surviving children of the Donor, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death, leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's grandchild or grandchildren per stirpes and not per capita.

[fol. 345] (j) In the event of the death of said son, Alvin Jay, at any time prior to the period provided for the payment to him of income herein leaving a valid last will and

testament and leaving issue him surviving (whether said issue be of a marriage to one of the same creed or shall have been approved by the wife of the Donor, Rella Cohen Factor, if she be living, or in case Rella Cohen Factor be not living, then by said Otis F. Glenn and/or Arthur L. Schwartz, or their successor or successors, or otherwise), then all of the income herein provided for said son, Alvin Jay, shall be and become a part of and shall be paid by the Trustee to his estate; and should he at any such time die intestate, leaving issue him surviving, then such income shall be allowed to accumulate until the termination of this trust, and the Trustee shall then divide the same equally among the then surviving children of the Donor, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death, leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild and/or grandchildren, per stirpes and not per capita.

(k) In the event of the death of said son, Alvin Jay, at any time prior to the period provided for payment of income to him, leaving no surviving widow and no issue, the income provided to be paid to said son shall be allowed to accumulate until the termination of this trust, and shall be paid at the termination of this trust to the same person and/or persons who would receive, in the event of said son's death prior to the termination of the trust, that portion of the corpus of the trust estate hereinafter provided to be paid to said son, Alvin Jay, in case he be living at the termination of the trust, as hereinafter provided.

[fol. 346] 10. The income herein provided to be paid to the Donor's wife, Rella Cohen Factor, in and by the provisions of this Article III hereof shall be paid to her on the 5th day of each month.

11. In case of the death of the Donor's wife, Rella Cohen Factor, at any time prior to the termination of the trust herein created, leaving a valid last will and testament, then all of the income herein provided to be set apart and paid to her, if living, shall be and become a part of and shall be paid by the Trustee to her estate, and should she so die intestate then the income herein provided to be set apart

and paid to her shall be allowed to accumulate until the termination of this trust, and the Trustee shall then divide the same equally among the surviving children of the Donor or in case any other of the Donor's children shall have preceded said Rella Cohen Factor in death leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

12. In the event that the Donor leaves him surviving one, but not more than one other child (other than said Jerome and Alvin Jay) then in lieu of the provision respecting income made for Donor's said wife and sons in paragraph 6 of Article III hereof, the Trustee shall (subject to the limitations hereinbefore provided) pay out and expend said income as follows:

(a) Forty per cent (40%) thereof to the Donor's wife, Rella Cohen Factor;

(b) Twenty per cent (20%) thereof to the Donor's son, Jerome;

(c) Twenty per cent (20%) thereof to the Donor's son, Alvin Jay; and

(d) Twenty per cent (20%) thereof to said hereafter-born child;

[fol. 347] said income allotted to such hereafter-born child to be used by my said Trustee by and with the approval of the mother of said hereafter-born child, in case said mother be then living, and in case said mother be then not living, then by and with the approval of Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors for the support, maintenance and education of said child until such child shall reach the age of twenty-one (21) years.

13. In the event that the Donor leaves him surviving more than one child (other than the Donor's said two sons, Jerome and Alvin Jay), then in lieu of the provision respecting income made for the Donor's said wife and sons in paragraph 6 of Article III hereof, the Trustee shall pay out and expend said income as follows:

(a) Thirty-three and one-third per cent (33⅓%) thereof to my said wife, Rella Cohen Factor;

(b) The balance of sixty-six and two-thirds per cent (66⅔%) thereof to be divided equally among all of the Donor's surviving children subject to the limitations hereinbefore provided), the share of such income allotted for each hereafter-born child to be expended by the said Trustee by and with the approval and consent of the mother of said hereafter-born child in case said mother be then living, and in case said mother be then not living, then by and with the approval and consent of said Otis F. Glenn and/or Arthur L. Schwartz, or their successor or successors, for the support, education and maintenance of any such hereafter-born child until it shall have reached the age of twenty-one (21) years.

14. In case of the death of any hereafter-born child of the Donor before the termination of the trust as provided in Article I hereof, leaving a child or children him or her surviving, and leaving a valid last will and testament, the income herein provided for said hereafter-born child shall be and become part of and shall be paid by the Trustee to [fol. 348] his or her estate, and should he or she die intestate leaving issue him or her surviving, then said income shall be allowed to accumulate until the termination of this trust, and the Trustee shall then divide the same equally among the surviving children of the Donor, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild or grandchildren, per stirpes and not per capita.

15. In case of the death of any child of the Donor which may be hereafter born, said hereafter-born child leaving no widow or widower and no issue him or her surviving, then the income herein provided to be paid to said hereafter-born child shall be allowed to accumulate until the termination of this trust, and shall be paid at the termination of this trust to the same person or persons who would receive in the event of said hereafter-born child's death, prior to the termination of this trust, that portion of the corpus of the trust estate herein provided to be paid to said

hereafter-born child in case he or she be living at the termination of the trust as herein provided.

16. In case of the death of any hereafter-born child of the Donor, said hereafter-born child leaving a widow or widower, but no issue him or her surviving, and leaving a valid last will and testament, then the share of the income herein provided to be paid to said hereafter-born child shall be and become a part of and shall be paid by the Trustee to his or her estate, and should he or she die intestate, leaving a widow or widower but no issue him or her surviving then such income shall be allowed to accumulate until the [fol. 349] termination of this trust and the Trustee shall then divide the same equally among the surviving children of the Donor, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the accumulated income which said child or children's parent would have received if living shall be paid to the Donor's grandchild and/or grandchildren, per stirpes and not per capita.

Article IV.

Distribution of Corpus of Estate

1. In the event that the Donor be living on the — day of November, 1950 (twenty (20) years after the date of this agreement) the Trustee shall pay to the Donor the entire corpus of the trust estate and thereupon the trust hereby created shall terminate in its entirety.

Upon the termination of the trust after the death of the Donor, as provided in Article I hereof, the Trustee shall distribute the corpus of the estate together with any and all accumulated income (not hereinbefore disposed of) therefrom to the persons mentioned in subparagraphs (a) to (h) of paragraph 2 of Article III hereof, if such persons be living at that time, as follows:

(a) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Leah Factor.

(b) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Gussie Mavergan;

(c) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to [fol. 350] said Dona Goldstein;

(d) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Nathan Factor;

(e) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Frank Factor;

(f) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Bernard Factor;

(g) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said William Cohen;

(h) The sum of three thousand three hundred and thirty-three dollars and thirty-three cents ($3,333.33) thereof to said Anna Cohen.

2. In the event that any of the Donor's said sisters or brothers or said brother-in-law be not living at the termination of the Trust as provided in Article I hereof, then the share of the corpus of the trust estate herein provided to be paid to said deceased brother, sister and/or brother-in-law shall be paid to his or her then living issue in equal shares, per stirpes and not per capita, and if any of said sisters or brothers or said brother-in-law shall have so died leaving no issue living at the termination of this trust, then the corpus of the trust estate herein provided to be paid to said deceased sister, brother and/or brother-in-law so dying without issue him or her surviving shall be and become a part of the residue and/or remainder of the corpus mentioned in paragraph 5 of this Article IV hereof, and shall be divided and paid out by the Trustee as hereinafter provided in this Article IV hereof.

3. In the event that the mother-in-law of the Donor, Anna Cohen, be not living at the termination of the trust as provided in Article I hereof, then the share of the corpus of the trust estate herein provided to be paid to her shall be paid to the Donor's wife, Rella Cohen Factor.

[fol. 351] 4. In case the Donor's mother, Leah Factor, be not living at the termination of the trust as provided in Article I hereof, then the share of the corpus of the trust estate herein provided to be paid to her shall be paid to the Donor's wife, Rella Cohen Factor. The provision herein in paragraphs 3 and 4 of this Article IV hereof made for the Donor's wife shall be in addition to the fifty per cent (50%) of the corpus of such trust estate hereinafter provided to be paid to said wife.

5. The residue of the corpus of said trust estate shall (subject to the provisions hereinafter mentioned) be paid out by said Trustee as follows:

(a) Fifty per cent (50%) thereof to the Donor's wife, Rella Cohen Factor;

(b) Fifty per cent (50%) thereof to the Donor's two said sons, Jerome Factor and Alvin Jay Factor, in equal shares.

6. In the event of the death of the Donor leaving him then surviving another child (other than said Jerome and Alvin Jay) then in lieu of the provision made for said wife of the Donor in subparagraph (a) of paragraph 5 of this article IV hereof, said Trustee shall turn over and deliver to said wife, forty per cent (40%) of the said residue of the corpus of said trust estate. And in lieu of said twenty-five per cent (25%) of the said residue of the corpus of the trust estate provided for each of the two sons of said Donor, in subparagraph (b) of paragraph 5 of this Article IV hereof, said Trustee shall turn over and deliver twenty per cent (20%) of said residue of said corpus of said trust estate to each of said two sons, Jerome and Alvin Jay, the remaining twenty per cent (20%) thereof to be held by said Trustee for the benefit of said other hereafter-born child; and [fol. 352] upon said hereafter-born child, if any, reaching the age of twenty-one (21) years said Trustee shall pay over to it as its sole and absolute property, the said twenty per cent (20%) of the residue of the corpus of the said trust estate.

7. In the event of the death of the Donor leaving him then surviving more than one child or children in addition to said

sons, Jerome and Alvin Jay, then in lieu of the provisions made for said Donor's wife of fifty per cent (50%) of the residue of the corpus of the trust estate in subparagraph (a) of paragraph 5 of this Article IV hereof, said Trustee shall pay over and deliver to said wife, thirty-three and one-third per cent (33⅓%) of said residue of the corpus of the trust estate; and in lieu of the provisions of twenty-five per cent (25%) each of the residue of the corpus of the trust estate each made in subparagraph (b) of paragraph 5 of this Article IV hereof for the two sons of the Donor, Jerome and Alvin Jay, the balance of said residue of the corpus of the trust estate consisting of sixty-six and two-thirds per cent (66⅔%) thereof (after providing for the wife of the Donor, as aforesaid) shall be by said Trustee distributed equally among all the children of the Donor who shall be living on the date of distribution, except that in no event shall any child receive his or her share of the corpus of the trust estate until he or she shall have attained the age of twenty-one (21) years.

8. In case of the death of the Donor's wife, Rella Cohen Factor, at any time prior to the termination of the trust herein created, leaving a valid last will and testament, then all of the corpus of the trust estate herein provided to be set apart and paid to her, if living shall be and become a part of and shall be paid by the Trustee to her estate, and [fol. 353] should she so die intestate then the corpus of the trust estate herein provided to be set apart and paid to her shall upon the termination of the trust be divided by the Trustee equally among the then surviving children of the Donor, or in case any of the Donor's children shall have preceded said Rella Cohen Factor in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

9. In case of the death of the Donor's son, Jerome, before the termination of the trust as provided in Article I hereof, leaving no widow and no issue him surviving, then and in that event the Trustee shall upon the termination of the trust divide the share of the corpus of paid trust estate

herein provided for said son among the Donor's then surviving child or children share and share alike, or in case any other of the Donor's children shall have preceded said son, Jerome, in death leaving a child and/or children his or her surviving, then the share of the residue of the corpus of the trust estate which said child or children's parent would have received, if living, shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

10. In case of the death of the Donor's son, Jerome, before the termination of the trust, as provided in Article I hereof, leaving issue him surviving, and leaving a valid last will and testament, then the share of the corpus of said trust estate which said son would receive had he been living at said time shall be paid by the Trustee to his estate; or should he so die intestate leaving issue him surviving then [fol. 354] and in that event the Trustee shall, upon the termination of this trust, divide the share of the residue of the corpus of the trust estate herein provided for said son, Jerome, among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said son, Jerome, in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

11. In case of the death of the Donor's son, Jerome, before the termination of the trust, as provided in Article I hereof, leaving a widow surviving him, but no issue him surviving, and leaving a valid last will and testament, then the share of the corpus of the trust estate which said Jerome would receive had he been living at said time shall be and become a part of and shall be paid by the Trustee to his estate; or should he so die intestate leaving a widow him surviving, but no issue, then and in that event the Trustee, upon the termination of this trust, shall divide the share of the residue of the corpus of the trust estate herein provided for said son, Jerome, among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said son, Jerome, in death leaving a child and/or children him or her surviving, then

the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

12. In case of the death of the Donor's son, Alvin Jay, before the termination of the trust as provided in Article I [fol. 355] hereof, leaving no widow and no issue him surviving, then and in that event the Trustee shall, upon the termination of this trust, divide the share of the corpus of said trust estate herein provided for said son among the Donor's then surviving child or children, share and share alike, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death leaving a child and/or children him or her surviving then the share of the residue of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

13. In case of the death of the Donor's son, Alvin Jay, before the termination of the trust, as provided in Article I hereof, leaving issue him surviving, and leaving a valid last will and testament, then the share of the corpus of said trust estate which said son would receive had he been living at said time shall be paid by the Trustee to his estate; or should he so die intestate leaving issue him surviving then and in that event the Trustee shall upon the termination of this trust divide the share of the residue of the corpus of the trust estate herein provided for said son, Alvin Jay, among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

14. In case of the death of the Donor's son, Alvin Jay, before the termination of the trust, as provided in Article I hereof, leaving a widow surviving him, but no issue him [fol. 356] surviving and leaving a valid last will and testament, then the share of the corpus of the trust estate which said Alvin Jay would receive had he been living at said time shall be and become a part of and shall be paid by the

Trustee to his estate; or should he so die intestate leaving a widow but no issue him surviving, then and in that event the Trustee shall, upon the termination of this trust, divide the share of the residue of the corpus of the trust estate herein provided for said son, Alvin Jay, among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said son, Alvin Jay, in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

15. In case of the death of a hereafter-born child of the Donor before the termination of the trust, as provided in Article I hereof, leaving no widow or widower and no issue him or her surviving, then and in that event the Trustee shall, upon the termination of this trust, divide the share of the corpus of said trust estate herein provided for said hereafter-born child among the Donor's then surviving child or children, share and share alike, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the residue of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

[fol. 357] 16. In case of the death of a hereafter-born child of the Donor before the termination of the Trust, as provided in Article I hereof, leaving issue him or her surviving, and leaving a valid last will and testament, then the share of the corpus of said trust estate which said hereafter-born child would receive had he or she been living at said time shall be paid by the Trustee to his or her estate; or should he or she so die intestate leaving issue him or her surviving, then and in that event the Trustee shall, upon the termination of this trust, divide the share of the residue of the corpus of the trust estate herein provided for said hereafter-born child among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said

child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

17. In case of the death of a hereafter-born child of the Donor before the termination of the trust, as provided in Article I hereof, leaving a widow or widower him or her surviving, but no issue him or her surviving, and leaving a valid last will and testament, then the share of the corpus of the trust estate which said hereafter-born child would receive had he or she been living at said time shall be and become a part of and shall be paid by the Trustee to his or her estate; or should he or she so die intestate leaving a widow or widower but no issue him or her surviving, then and in that event the Trustee shall, upon the termination of this trust, divide the share of the residue of the corpus of [fol. 358] the trust estate herein provided for said hereafter-born child among the Donor's then surviving child and/or children, or in case any other of the Donor's children shall have preceded said hereafter-born child in death leaving a child and/or children him or her surviving, then the share of the corpus of the trust estate which said child or children's parent would have received if living shall be paid to the Donor's said grandchild and/or grandchildren per stirpes and not per capita.

18. If upon the termination of the trust as provided in Article I hereof, the Donor's wife, Rella Cohen Factor, be living but no surviving child or grandchild of the Donor who would take under the terms of this agreement be then living, and none of said deceased children having died leaving a valid last will and testament and a widow or widower and/or issue him or her surviving, then and in that event the Trustee shall pay that portion of the corpus of the trust estate which would have been paid to said children and/or grandchildren had they or any of them been living at the termination of said trust, to the wife of the Donor, Rella Cohen Factor.

19. If upon the termination of the trust as provided in Article I hereof, the Donor's wife, Rella Cohen Factor, be not living, and there be no children and no grandchildren of the Donor who would take under the provisions of this agreement then living, and none of said deceased children having died leaving a valid last will and testament and a

widow or widower and/or issue him or her surviving, then and in that event the Trustee shall distribute seventy-five per cent (75%) of the residue of the corpus of the trust estate mentioned and described in paragraph 5 of this Article IV hereof to any Jewish charity in Chicago, Illinois, [fol. 359] to be selected by said Trustee, and shall distribute and pay over the remaining twenty-five per cent (25%) thereof to any other charity or charities in the City of Chicago, Illinois, to be selected by said Trustee.

Article V

Amendments

1. The Donor notwithstanding any provisions herein contained expressly reserves the right at any time hereafter during the lifetime of said Donor to substitute any beneficiary in this trust agreement mentioned for any other beneficiary and to direct the Trustee hereunder to pay any share of income and/or corpus of the trust herein provided to be paid to any such beneficiary to such newly designated beneficiary in place and instead of to such beneficiary herein named, provided, however, that nothing herein contained shall be construed as giving the Donor (excepting always the right in the Donor to receive the income from the trust estate for a period of twenty (20) years after the date of this agreement, or if he sooner die, then during the whole of his natural life, and to receive the entire corpus of the trust estate twenty (20) years after the date of this agreement in the event that said Donor be then living) the right to designate himself and/or his estate as a beneficiary in the place and stead of any other herein named beneficiary.

2. Any direction or directions to the Trustee hereunder relating to such substitution of one beneficiary for another or relating to the payment of the share of income and/or corpus of one beneficiary to another hereunder, shall be in writing and shall be signed, sealed and acknowledged by the Donor and delivered to the Trustee hereunder.

[fol. 360]

Article VI

Supervision of Trust Management

1. After the death of the Donor, Otis F. Glenn and/or Arthur L. Schwartz, of the City of Chicago, Illinois, shall

approve all investments of every kind and character which shall be made by the Trustee hereunder and the Trustee is hereby directed to make no investments of any of the trust estate after the date of the Donor's death, without first having obtained the approval in writing thereof of the said Otis F Glenn and/or Arthur L. Schwartz, or their successor or successors.

2. The Trustee is further directed that after the death of the Donor, in all matters pertaining to the investing, reinvesting, caring for, improving, protecting, dealing with, selling or otherwise disposing of, managing, controlling and/or distributing the said trust estate, it shall first before performing any of said acts advise, consult with and secure the written approval of Otis F. Glenn and/or Arthur L. Schwartz and/or their successor or successors to any such action to be taken by it in behalf of the trust estate.

3. In case of the death, resignation, inability and/or refusal to act of the said Otis F. Glenn in the supervision of the care, management, control, investment, reinvestment and distribution of the income and/or corpus of the trust estate as aforesaid, then and in that event all of said acts of supervision shall be exercised by Arthur L. Schwartz of the City of Chicago, Illinois.

4. In case of the death, resignation, inability and/or refusal to act of Arthur L. Schwartz in the supervision of the care, management, control, investment, reinvestment, and distribution of the income and/or corpus of the trust estate as aforesaid, then and in that event all of said acts [fol. 361] of supervision shall be exercised by the said Otis F. Glenn of the City of Chicago, Illinois.

5. In case of the death, resignation, inability and/or refusal to act of both the said Otis F. Glenn and Arthur L. Schwartz in the supervision of the care, management, control, investment, reinvestment and distribution of the income and/or corpus of the trust estate as aforesaid, then and in that event the then acting Chief Justice of the Supreme Court of the State of Illinois shall appoint a successor or successors (not more than two in number, however) to act in the place and stead and perform the same duties hereunder as are provided to be performed by the said Otis F. Glenn and/or Arthur L. Schwartz, and in mak-

ing such selection of a successor and/or successors, it is the desire of the Donor that said Chief Justice give preference to some member of the law firm of Levinson, Becker, Glenn & Schwartz, or its successor if there be a member or members of that firm, or its successor, who is or are proper and suitable, in the judgment of said Chief Justice, to assume and efficiently perform such duties.

6. The approval or disapproval of any marriage in this agreement mentioned shall be evidenced to the Trustee by a statement in writing delivered to the Trustee duly signed by Bella Cohen Factor and/or Otis F. Glenn, Arthur L. Schwartz and/or their successor or successors as the case may be.

7. Payment of income during the minority of any beneficiary hereunder, may, at the sole discretion of the Trustee, be made to any such minor beneficiary or to his or her lawful guardian, or to any person whom the Trustee shall have determined to be entitled to receive such payments. The Trustee shall be under no duty to see to the application of such income after making payment thereof, and the law-
[fol. 362] ful receipt of such minor beneficiary or of his or her lawful guardian, or of the person entitled to receive such payments, in the judgment of the Trustee, shall be sufficient disharge therefor to the Trustee.

In witness whereof the Donor has subscribed his name and affixed his seal hereto, and the Trustee has caused this instrument to be executed by its duly authorized Vice President and attested by its Assistant Secretary, all on the day and year aforesaid.

John Factor, Donor. (Seal.) Foreman-State Trust and Savings Bank, Trustee, by Morris E. Feiwell, Vice-President.

Attest:

L. C. Coyner, Ass't Secretary. (Seal.)

[fol. 363] State of Illinois,
County of Cook, ss:

I, Paul Weiner, a notary public in and for the County of Cook and State of Illinois, do hereby certify that John Factor, personally known to me to be the same person whose name is subscribed to the foregoing instrument, ap-

peared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 3rd day of November, A. D. 1930.

Paul Weiner, Notary Public. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

I, Paul Weiner, a notary public in and for said County, in the State aforesaid, do hereby certify that Morris E. Feiwell, Vice Pres. of Foreman-State Trust and Savings Bank, and L. C. Coyner, Asst. Secretary of said Corporation, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such Vice-President and Asst. Secretary, respectively, appeared be-[fol. 364] fore me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their own free and voluntary act, and as the free and voluntary act of said corporation, for the uses and purposes therein set forth, and the said Asst. Secretary did also then and there acknowledge that he, as custodian of the corporate seal of said corporation, did affix said corporate seal of said corporation to said instrument as his own free and voluntary act, and as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this 3rd day of November, A. D. 1930.

Paul Weiner, Notary Public. (Seal.)

[fol. 365] Mr. Kearns:

Q. Will you state, if you know, what amounts, if any, Foreman Trust received from Mr. Factor under the terms of that trust?

A. One million dollars.

Q. I beg your pardon?

A. One million dollars.

Q. And that is all that it ever received from Mr. Factor under the terms of that trust?

A. Yes, sir.

Q. I hand you Exhibit D attached to the answer of the Trustees filed herein on April 4, 1932, and ask you if Exhibit B is a correct list of the assets and securities and the cash held by Foreman Trust on the date designated in the Factor Trust?

A. Yes, sir.

Q. Were all the securities listed on that Exhibit B purchased by Foreman Trust in pursuance of the powers granted it by the trust instrument, and were such purchases approved or ratified by Mr. Factor?

A. Yes, sir.

Q. Has the Foreman Trust continued to make investments since the filing of that answer, not only in pursuance of the terms of the trust agreement, but in pursuance of the statutes of the State of Illinois governing investments by trustees?

A. Yes, sir.

[fol. 366] Q. Has the Foreman Trust made any distribution under the terms of that trust to any beneficiary since the filing of the Trustees' answer?

A. No, sir.

Q. Has it made any since the filing of the bill in the cause?

A. No, sir.

Q. Commencing shortly after the 30th of August, this year, did Foreman Trust liquidate a great portion of the securities in its possession, and were such liquidations and sales approved by Mr. Factor?

A. Yes, sir.

Q. I ask you to produce from the files of the Foreman Trust an original document signed by Mr. Factor dated August 30, 1932, and constituting a change of beneficiary?

A. Yes, sir.

Mr. Kearns: I ask that it be marked "Foreman State Exhibit No. 2."

(The document was thereupon marked as requested.)

Mr. Kearns:

Q. I show you pages 35 and 36 of the Counter-Claim of the trustees filed in September 21, 1932, and ask you if Exhibit Foreman Trust Change of Beneficiary appearing

therein is substantially a true copy of the document which [fol. 367] you have so produced?

A. Yes, sir.

Mr. Kearns: I offer Foreman State Trust & Savings Bank Exhibit No. 2 in evidence and ask that the copy thereof attached to the counter-claim may be put in the record in lieu thereof.

The Court: It may be so admitted.

(Thereupon said document so offered and received in evidence was marked Foreman State Trust & Savings Bank Exhibit No. 2; and is in words and figures as follows, to-wit:)

[fol. 368] FOREMAN TRUST EXHIBIT 2

"Foreman Trust Change of Beneficiary"

To Foreman-State Trust and Savings Bank of Chicago, Illinois, as Trustee under a Trust Agreement Dated November 3, 1930, and known on Its Records as Trust Number 5568

Whereas, under a Trust Agreement dated November 3, 1930, between the undersigned, John Factor, (therein called the Donor) and said Foreman-State Trust and Savings Bank (therein called the Trustee) certain trusts were created and more specifically set forth in said Agreement;

And whereas, Article V of said Agreement reads as follows:

"Article V.

Amendments

"1. The Donor notwithstanding any provisions herein contained expressly reserves the right at any time hereafter during the lifetime of said Donor to substitute any beneficiary in this trust agreement mentioned for any other beneficiary and to direct the Trustee hereunder to pay any share of income and/or corpus of the trust herein provided to be paid to any such beneficiary to such newly designated beneficiary in place and instead of to such beneficiary herein named, provided, however, that nothing herein contained shall be construed as giving the Donor (excepting

always the right in the Donor to receive the income from the trust estate for a period of twenty (20) years after the date of this agreement, or if he sooner die, then during the whole of his natural life, and to receive the entire corpus of the trust estate twenty (20) years after the date of this agreement in the event that said Donor be then living) the right to designate himself and/or his estate as a beneficiary in the place and stead of any other herein named beneficiary.

"2. Any direction or directions to the Trustee hereunder relating to such substitution of one beneficiary for another or relating to the payment of the share of income and/or corpus of one beneficiary to another hereunder, shall be in writing and shall be signed, sealed and acknowledged by the Donor and delivered to the Trustee hereunder."

And whereas, the undersigned desires to exercise the right reserved to him under said Article V of said Agreement as hereinafter set forth.

Now, therefore, pursuant to and in exercise of the right reserved to him under said Article V of said Agreement, the undersigned as the Donor thereunder does hereby substitute his wife, Rella Cohen Factor, as the sole beneficiary under said Agreement for and in the place and stead of all the beneficiaries (including the undersigned) in said Agreement named or in any way defined, mentioned or described and who are now in being or may hereafter come into being, and the undersigned does hereby direct said Trustee, upon receipt of this Instrument, to pay out and distribute to the said Rella Cohen Factor, the entire corpus and undistributed net income of the Trust Estate under said Agreement after deducting therefrom and retaining such sums as may be required to satisfy and pay all costs, taxes, charges and expenses pertaining to said Trust Estate, including reasonable compensation for the services of said Trustee.

In witness whereof the undersigned has hereunto set his hand and seal at Chicago, Illinois, this 30th day of August, 1932.

(Sgd.) John Factor. (Seal.)

STATE OF ILLINOIS,
County of Cook, ss:

I, G. Gale Gilbert, Jr., a notary public in and for the County of Cook and State of Illinois, do hereby certify that John Factor, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said Instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 30th day of August, A. D. 1932.

(Sgd.) G. Gale Gilbert, Jr., Notary Public. (Seal.)

[fol. 369] Mr. Kearns:

Q. Will you produce from the files of the Foreman Trust & Savings Bank an original request for certain documents presented to you by John Factor and Rella Cohen Factor on or about the 17th of September, 1932?

A. Yes, sir.

Q. I show you page 5 of that request and ask if those are the signatures of Rella Cohen Factor and John Factor?

A. Yes, sir.

Mr. Kearns: May that be marked Foreman Exhibit 3?

(The document was thereupon marked as requested.)

Mr. Kearns:

Q. I hand you pages 39 to 68 of the counter-claim of the Trustee filed herein, and ask if those pages contain substantially the true and correct copy of the document that you have just produced?

A. Yes, sir.

Mr. Kearns: I offer in evidence Foreman Exhibit No. 3, and ask that the copy thereof attached to the counter-claim stand in lieu of the original.

The Court: It may be admitted.

(Thereupon said document so offered and received in evidence *and* was marked Foreman Trust & Savings Bank, [fol. 370] Exhibit No. 3 and is in words and figures as follows, to-wit:)

[fol. 371] FOREMAN TRUST EXHIBIT 3

"Foreman Trust Settlement Request"

September 17, 1932.

To Foreman-State Trust and Savings Bank of Chicago, Illinois, as trustee under a trust agreement dated November 3, 1930, and known on its records as Trust No. 5568.

GENTLEMEN: On or about November 3, 1930, the undersigned, John Factor, established a trust with you under an agreement as of that date. On or about August 30, 1932, in pursuance of the power reserved by said John Factor in creating said trust he made the undersigned, Rella Cohen Factor, the sole and only beneficiary of said trust.

John Factor has entered into a settlement agreement of certain controversies between himself and others involving the right and title to the funds, securities and assets held under the terms of said trust. A true copy of said settlement agreement is attached hereto and made a part hereof as if herein set forth in full.*

The undersigned, Rella Cohen Factor, as the sole and only beneficiary of said trust, hereby requests that you pay over and deliver from the assets of said trust the sum of $450,023.11 together with the notes secured by first mortgage trust deeds, as selected by John H. S. Lee and M. D. Follansbee, all in pursuance of the terms of said settlement agreement. The notes secured by mortgages on Chicago real estate so selected by Lee and Follansbee, and which are to be delivered by you insofar as they are included in the assets of the above mentioned trust, are described in the attached letter from Lee and Follansbee of even date herewith (all terms and provisions of said letter are satisfactory to both of us), and have a face value, including interest, of $299,953.88. I realize that the total amount of the selected notes secured by mortgages on Chicago real estate does not total exactly $300,000, as is provided by the terms of said settlement agreement, but I hereby authorize you to pay in cash one-half of the differ-

*NOTE.—Settlement agreement set out at pages 363-388 of this certificate and therefore not included at this point in certificate.

ence between the total face value of such notes, including interest, and $300,000.

In accordance with the terms of said settlement agreement said cash and notes are to be paid and delivered by you as follows:

(a) You are to pay to John H. S. Lee one-half of such sum as the United States District Court for the Northern District of Illinois, Eastern Division, in the case of Faber, et al. vs. Foreman-State Trust and Savings Bank, et al., in Equity No. 10538, may determine shall be in full reimbursement of all court costs of Arthur Traviss Faber and Adah Hayhurst, the original plaintiffs in that cause and the intervenors in that cause represented by Mr. Lee, all out-of-pocket expenses of John H. S. Lee and Ralph Wordsworth, and of said original plaintiffs and said intervenors and their other solicitors in England (including the traveling expenses of the plaintiffs, their solicitors and attorneys), and the expenses of taking depositions;

(b) You are to pay to John H. S. Lee one-half of such sum as said court in said cause may determine to be in full payment of all said original plaintiffs' and said intervenors' attorneys' fees; three-thirteenths of the amount so determined is to be in such of the notes described on the attached list of notes selected as may be agreed upon by said John H. S. Lee and M. D. Follansbee, or as may be directed by the order of said court in said cause; and ten-thirteenths of such sum is to be in cash;

(c) You are to pay to Tamplin, Joseph, Ponsonby, Ryde & Flux, of London, England, as solicitors for Arthur Traviss Faber and Millicent Elizabeth Faber one-half of the [fol. 371½] sum of £1425, a draft in said amount and so payable to be delivered to John H. S. Lee;

(d) You are to pay to Tamplin, Joseph, Ponsonby, Ryde & Flux, of London, England, as solicitors for Adah Hayhurst, one-half of the sum of £1200, a draft in said amount and so payable to be delivered to John H. S. Lee;

(e) You are to pay and deliver to George Digby Pepys, as Senior Official Receiver in Companies Liquidation of the Kingdom of Great Britain, and as liquidator of Broad Street Press, Limited, of Vulean Copper Mines, Limited,

and of Rhodesia Border Mining Corporation, Limited, the entire balance of said sum of $450,000 in cash and notes secured by first mortgage deeds of trust as described in the said list attached hereto and in your possesssion, after deducting the payments and deliveries required by the terms of a, b, c and d above. Said payments and said deliveries so to be made to the British Receiver are directed to be paid, as to cash by payment to the Bank of England (Law Courts Branch) for the credit of the Senior Official Receiver in Companies Liquidation, and as to the notes, by the delivery to M. D. Follansbee, the agent in Chicago of J. P. Morgan & Co., 23 Wall Street, New York, the bankers of said Senior Official Receiver.

After making said payments and deliveries and after deducting your reasonable fees and expenses and the fees and expenses of your attorneys and any other amounts directed to be paid to anyone else by said court, will you please pay over and deliver to the undersigned, Rella Cohen Factor, all remaining cash, securities and other assets of said trust.

Said settlement agreement provides for the payment of the sum of $1,000,000 in cash, $100,000 of which has already been paid. Of the balance, totaling $900,000, one-half is to be paid from your said trust and the other one-half is to be paid from a similar trust of which First Union Trust and Savings Bank is trustee. In adddition to the payment of said $1,000,000 in cash said settlement agreement provides for the delivery of notes having a face value of $300,000 including accrued interest at the time of delivery. Said settlement agreement likewise provides that three-thirteenths of the fee allowed to John H. S. Lee by the court shall be payable in mortgages. In the event the mortgages so selected plus accrued interest thereon, do not total exactly $300,000 or in case the portion of such mortgages delivered to Lee do not total exactly three-thirteenths of the sum directed by said court to be paid to said Lee in full payment of all original plaintiffs' and intervenors' attorneys' fees, but total an amount slightly more or less than (a) said sum of $300,000 and/or (b) said three-thirteenths of said sum allowed by this court to John H. S. Lee in full payment of all original plaintiffs' and intervenors' attorneys' fees, then you are requested to

make such minor adjustments by payments of cash to said British Receiver and/or to said John H. S. Lee as may be necessary to effect substantial compliance with the terms of said settlement agreement, and so that the total of cash plus face value of notes plus accrued interest paid and delivered by both you and First Trust under the terms of said settlement agreement aggregates exactly $1,200,000. One-half of said cash adjustments are to be paid from each trust.

The undersigned, John Factor, executes this letter and joins in this request to indicate his approval of the entire transaction and as the settlor under your said trust.

Rella Cohen Factor, John Factor.

[fol. 372] Mr. Kearns:

Q. Does the Foreman Trust & Savings Bank have any knowledge of any claim against these funds in its hands except for parties to this case?

A. No, sir.

Mr. Kearns: That is all. Any cross examination?

Mr. Gilbert: No cross examination.

(Witness excused.)

Mr. Kearns: I will call Mr. Gilbert.

[fol. 373] G. Gale Gilbert, called as a witness herein, having been previously sworn, was examined in chief by Mr. Kearns and testified as follows:

Q. Will you state your name, please?

A. My name is G. Gale Gilbert. My address is 831 Clinton Place, Evanston, Illinois. Occupation, lawyer, representing the defendants John Factor, Rella Cohen Factor, and Arthur Schwartz in this case.

Q. And other defendants?

A. Yes, and other defendants.

Q. Have you been, have you in your possession, an original settlement agreement dated July 19, 1932, between John Factor, John H. S. Lee, Ralph Wordsworth and Samuel Bigby Pepys?

A. I have.

Mr. Healy: Isn't that all in evidence?

Mr. Kearns: Mark this Trustee's Exhibit 4.

(The document was thereupon marked as requested.)

By Mr. Kearns:

Q. Turn to page 13 of the document; I ask you if you are familiar with the signatures thereon?

A. I am; I saw all the signatures to this document placed [fol. 374] there by the individuals on that sheet.

Q. I hand you pages 43 to 65, inclusive, of the counter-claim of the trustees and ask you if those pages contain a true copy of the Trustee's Exhibit No. 4 together with the exhibits thereto?

A. Pages 43 to 62 of the counter-claim of the bank defendants in this case is a true and correct copy of the settlement agreement executed on the 19th day of July, 1932, by and between George Bigby Pepys, John Factor, John H. S. Lee and Ralph Wordsworth?

Q. And the following pages?

A. The following pages, page 63—of the exhibits attached here in the counter-claim are true copies of the exhibits attached to the contract—I had difficulty in picking out the pages.

Mr. Kearns: I offer in evidence Trustee's Exhibit No. 4 and ask leave to withdraw it, and ask that a true copy, that the true copy attached to the Trustee's counter-claim stand in lieu thereof.

The Court: It may be admitted.

(Said document so offered and received in evidence was thereupon marked Trustee's Exhibit No. 4, and is in words and figures as follows, to-wit:)

[fol. 375] TRUSTEE'S EXHIBIT 4

Exhibit "Settlement Agreement"

This agreement is made the 19th day of July, 1932, between George Digby Pepys the Senior Official Receiver in Companies Liquidation (hereinafter referred to as "the Liquidator") in his capacity as Liquidator of Broad Street Press Limited and also where so stated in his capacity as Liquidator of the Vulcan Copper Mines Limited (herein-

after referred to as "the Vulcan Company") and also where so stated in his capacity as Liquidator of Rhodesia Border Mining Corporation Limited (hereinafter referred to as "the Rhodesia Company") of the first part John Factor (sometimes known as Jacob Factor and hereinafter referred to as "Mr. Factor") acting by George Gale Gilbert Junior his duly authorized Agent of the second part Ralph Wordsworth a member of the first of Wordsworth Marr Johnson & Shaw of 39 Lombard Street in the City of London (hereinafter referred to as "Mr. Wordsworth") of the third part and John Henry Sheldon Lee (hereinafter referred to as "Mr. Lee") of the fourth part whereas Broad Street Press Limited and the Liquidator as its Liquidator have certain claims against Mr. Factor one Arthur Jack Klein and one Harry Geen (sometimes known as Harry Green) in respect of matters arising out of the affairs of Broad Street Press Limited and whereas Mr. Lee is acting as solicitor for the Plaintiffs and the intervenors in certain proceedings pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, the short title of which proceedings is Arthur Traviss Faber et al. v. Foreman-State Trust & Savings Bank et al. In Equity No. 10538 in which Mr. Factor is a defendant and in which proceedings the Plaintiffs make certain claims against Mr. Factor which appear from the Second Amended Bill of Complaint filed in those proceedings instituted on the 15th day of May 1931 and whereas Mr. Wordsworth was instrumental in obtaining the intervention of the intervenors in the said proceedings and whereas two of the other Defendants in the said proceedings namely the Foreman-State Trust & Savings Bank and the First Union Trust & Savings Bank (hereinafter referred to collectively as "the two banks") hold cash and securities in the account of two certain trusts in which Mr. Factor is interested as settlor and beneficiary which Mr. Factor represents are of an aggregate value sufficient to provide thereout notes secured by first mortgage trust deeds (hereinafter referred to as "notes") of the aggregate face value including accrued interest of 300,000 dollars and 1,000,000 dollars in cash and whereas it has been agreed between the Liquidator and Mr. Factor that all claims by Broad Street Press Limited the Vulcan

Company and the Rhodesia Company and the Liquidator as the Liquidator thereof against Mr. Factor shall be compromised on and subject to the terms and conditions hereinafter appearing which include the taking of a decree in the said proceedings in the said District Court (referred to hereafter as "the District Court proceedings") as hereinafter mentioned now in consideration of the mutual covenants and agreements herein contained it is hereby agreed and declared as follows:

1. Mr. Factor shall pay and deliver or cause to be paid and delivered in the manner hereinafter appearing:

(a) the sum of 100,000 dollars in cash from the funds of the said two trusts (hereinafter referred to as "the deposit");

(b) the sum of 900,000 dollars from the funds of the said two trusts, and

(c) notes secured by first mortgage trust deeds of the aggregate face value including accrued interest of 300,000 dollars such notes to be selected jointly by a party to be nominated by the Liquidator and Mr. Lee from the whole of the said Notes held by the two Banks,

said payments and deliveries to be paid and accepted in full satisfaction and discharge of all civil claims by the [fol. 376] Broad Street Press Limited the Vulcan Company or the Rhodesia Company and the Liquidator as the Liquidator thereof against Mr. Factor, Rella Cohen Factor, Mr. Klein and Mr. Geen.

2. In the event of this Agreement becoming final and fully operative as provided in Clause 10 hereof the money provided to be paid and the notes provided to be delivered by virtue of Clause 1 hereof shall be paid out and distributed as follows: (a) The Court costs of the Plaintiffs and Intervenors (it being provided in the Plaintiffs' second amended Bill of Complaint in said cause that all parties similarly situated may intervene in such suit by paying their pro rata share of the expenses thereof) all out-of-pocket expenses of Mr. Lee and Mr. Wordsworth and of the Plaintiffs and Intervenors and their other Solicitors in England (including the travelling expenses of the Plain-

tiffs their solicitors and attorneys) and the expenses of taking depositions, all as established by the itemized signed statements of account to be presented to the United States District Court upon the entry of the decree hereinafter mentioned shall first be paid only out of the moneys mentioned in Clause 1 hereof to Mr. Lee and shall be repaid by Mr. Lee to the persons entitled thereto. Any decree hereinafter mentioned shall provide for the payments hereinbefore described. (b) The attorneys' fees of Mr. Lee shall after hearing first had thereon as hereinafter provided be fixed and allowed to the Plaintiffs and Intervenors in said cause pending in the United States District Court for the Northern District of Illinois and shall be charged only against the money and securities mentioned in Clause 1 hereof and shall be paid to Mr. Lee as follows: Three-thirteenths thereof in notes and ten-thirteenths thereof in cash such attorneys' fees to include upon proper proof thereof such legal services as have been rendered to Mr. Lee and which Mr. Lee has obligated himself to pay. The provision herein that attorneys' fees are to be allowed to the Plaintiffs and Intervenors instead of to Mr. Lee direct shall not affect the right of anyone to object and be heard thereon by the Court as to the amount of said attorneys' fees. The said decree of the Court hereinbefore and hereinafter mentioned shall contain the provisions of this clause as to the payment of attorneys' fees. The attorneys' fees to be so fixed and determined by the Court shall be fixed upon the basis that the services have been rendered on a contingent fee basis; the hearing or hearings thereon shall be held in chambers; the depositions heretofore taken in said cause, if offered or read, and any other evidence offered or considered upon such hearing or hearings shall with the consent of the Court be impounded suppressed and sealed up by the Court; expert witnesses, if any, shall be limited to three on each side unless otherwise ordered by the Court; if the letter of Mr. Wordsworth's Firm dated August 26th 1931 shall be considered competent material and relevant by the Court upon such issue, then his testimony by way of Affidavit (a copy whereof has been initialled by Mr. Gilbert and Mr. Lee for the purposes of identification) with respect thereto may be admitted. (c) The next payment which shall be made from said moneys mentioned in Clause 1 hereof shall be made by draft of the First Union Trust and

Savings Bank on the Bank of England in the sum of £4,525 payable to Tamplin Joseph Ponsonby Ryde and Flux London solicitors for Arthur Travis Faber and Millicent Elizabeth Faber and said draft shall be delivered to Mr. Lee who shall concurrently therewith deliver to Mr. Gilbert upon behalf of Mr. Factor a release signed by said Arthur Travis Faber and Millicent Elizabeth Faber which said release has heretofore been initialled by Mr. Lee and Mr. Gilbert for identification and the decree herein mentioned shall so provide. (d) The next payment which shall be made from said moneys mentioned in Clause 1 hereof shall [fol. 377] be made by draft of the said First Union Trust and Savings Bank on the Bank of England in the sum of £1,200 payable to Tamplin Joseph Ponsby Ryde and Flux London solicitors for Adah Hayhurst and said draft shall be delivered to Mr. Lee who shall concurrently therewith deliver to Mr. Gilbert upon behalf of Mr. Factor a release signed by said Adah Hayhurst which said release has heretofore been initialled by Mr. Lee and Mr. Gilbert for identification and the decree herein mentioned shall so provide. (e) The cash and notes remaining after the delivery and payment of the moneys and notes set forth in Clauses 2 (a), 2 (b), 2 (c) and 2 (d) shall be paid to the Liquidator as more particularly provided under Clause 8 hereof and the Liquidator agrees to accept such balance (after taking into account the said deposit of 100,000 Dollars) in full satisfaction and discharge of all civil claims by the Broad Street Press Limited, the Vulcan Company and the Rhodesia Company and the Liquidator as the Liquidator thereof against Mr. Factor, Rella Cohen Factor, Mr. Klein and Mr. Geen personally and upon the payment of said sums and the delivery of said notes the Liquidator undertakes and agrees concurrently therewith and in consideration therefor (1) to sign a release and deliver the same to Mr. Factor in the form annexed hereto and marked Exhibit A (2) to deliver to Mr. Gilbert on behalf of Mr. Factor the transfers referred to in Clause 4 hereof (3) to deliver to Mr. Gilbert on behalf of Mr. Factor all memoranda of release signed by the shareholders referred to in Clause 9 (a) hereof which may at any time be received by him (4) to undertake and agree that all proceedings in the pending action by the Broad Street Press Limited against Mr. Klein (1932 B. No. 170) to recover certain Bonds in the State of San Paulo

Coffee Realisation Loan 1930 and moneys alleged to be long to the Broad Street Press Limited are to be stayed and settled on the terms that the said Bonds and/or cash representing the same now standing in the joint names of Mr. Wordsworth and Mr. Leonard William Fyson be released to Mr. Klein and that each party pay his own costs of the said action;

Provided always that notwithstanding anything contained in this Agreement Broad Street Press Limited and the Liquidator as its Liquidator expressly reserve all rights which they or either of them may have to prosecute or commence and prosecute any proceedings in the English Courts against any other person firm or Company now within the jurisdiction of the High Court of Justice in England to recover any money property or other assets claimed by the Liquidator as being assets of Broad Street Press Limited and particularly (a) certain pending proceedings in the High Court of Justice Companies Court against one Herbert John Spellen the short title whereof, is re Broad Street Press Limited and re The Companies Act of 1929 No. 00677 of 1930 (b) certain pending proceedings relating to various securities which stood in the name of Samuel Fraser the short title whereof is as above and (c) a claim against one Augustus Young in respect of certain securities sold by the said Augustus Young on behalf of Broad Street Press Limited in or about October 1930. It is further agreed that the said Broad Street Press Limited and the Liquidator as its Liquidator will not seek in any such proceeding to secure any personal judgment against Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen or to reach any money property or assets now in the hands of Mr. Factor, Rella Cohen Factor, Mr. Klein, Mr. Geen or the Defendant Banks in the aforesaid cause of Faber et al versus Foreman-State Trust & Savings Bank et al or any proceeds of any such property or assets. Mr. Factor, Rella Cohen Factor, Mr. Klein and/or Mr. Geen may intervene and Mr. Factor may be added as a Defendant if the Court shall so order in any such proceedings however and in the event of the Court deciding that any money property or other assets claimed in any such proceedings are the property of Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen, the Liquidator will not claim any right [fol. 378] or take any steps to prevent any such property

money or other assets being paid or transferred to Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen or any one or more of them.

3. The Liquidator will as soon as practicable despatch to each shareholder of the Vulcan Company and the Rhodesia Company (who bought his or her shares in either or both of those Companies from or through Broad Street Press Limited) a letter in the form annexed hereto and marked Exhibit "B" (hereinafter referred to as "the Liquidator's circular") and the Liquidator will admit proofs by each such shareholder in the Vulcan Company and each such shareholder in the Rhodesia Company as creditors in the liquidation of Broad Street Press Limited for the sum or sums paid by him or her for the purchase of his or her shares in the Vulcan Company and/or the Rhodesia Company (less the total amounts (if any) received by him or her by way of return of capital in the liquidations of the Vulcan Company and/or the Rhodesia Company) and also by all persons who contracted with and made payment to the Broad Street Press Limited for shares in the Vulcan Company and/or the Rhodesia Company but did not receive delivery of such shares.

4. The Liquidator as Liquidator of the Vulcan Company and the Rhodesia Company respectively will procure those Companies to transfer to Mr. Factor or his nominee (but without giving any covenants or warranties for title or otherwise) such interest (if any) as the Vulcan Company and the Rhodesia Company may have in the mining rights or claims alleged by the Vendors thereof to have been contracted to be purchased by the Vulcan Company and/or the Rhodesia Company (drafts whereof have been initialled by the Liquidator and Mr. Gilbert for the purpose of identification). The Liquidator has already rejected proofs by the Vendors of such mining rights or claims in the liquidations of the Vulcan Rhodesia Companies for the balance of the purchase considerations payable under the alleged contracts for sale and purchase and the foregoing provision is without prejudice to the contention of the Liquidator that (inter alia) the said two Companies acquired no rights of any value in the said mining rights or claims and shall not preclude the Liquidator from maintaining that attitude and resisting the appeals by such Vendors from the rejection of their proofs by the Liquidator.

5. Mr. Wordsworth and Mr. Lee will as soon as practicable despatch to each of the Plaintiffs and intervenors and all other parties who have authorized them or either of them in writing to act on their behalf a letter in the form attached hereto marked Exhibit "C".

6. Mr. Wordsworth undertakes and agrees that after this Agreement has been completed and the payments made as provided under Clauses 1 and 2 hereof he will not directly or indirectly represent or counsel with anyone who may assert any claim or claim any right against Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen in connection with any transactions involving the Broad Street Press Limited or otherwise except to the extent provided in Clause 2 hereof. Mr. Lee undertakes and agrees that after this Agreement has been completed and the payments made as provided under Clauses 1 and 2 hereof he will not directly or indirectly represent or counsel with anyone who may assert any claim or claim any right against Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen on any account or against any other person or persons in connection with any transactions involving the Broad Street Press Limited.

7. On the signing and exchange of this Agreement Mr. Factor has paid to the Liquidator a deposit of 100,000 dollars as provided in Clause 1 (a) hereof on account and in part payment of the total sum payable under Clause 1 hereof and the Liquidator acknowledges receipt of the said deposit and agrees to hold the sterling equivalent thereof [fol. 379] converted on the day of its receipt by him as a deposit under the terms of this Agreement. The said deposit shall be returnable by the Liquidator as hereinafter specified to the First Union Trust and Savings Bank in certain events hereinafter specified but in the event of this Agreement becoming final and fully operative in accordance with Clause 10 hereof the said deposit shall be immediately applied to the total payments to be received by the Liquidator hereunder and if by reason of any default on the part of Mr. Factor or any failure by him to procure the terms to be performed by him to be carried into effect in accordance with the provisions of this Agreement or if the payments to be made by Mr. Factor under this Agreement are not paid within the time hereby limited said deposit shall be forfeited to the Liquidator. In the event of the said de-

posit being forfeited as aforesaid the Liquidator will retain one half part thereof as Liquidator of the Broad Street Press Limited and will forthwith pay the other half part to the joint account of Mr. Lee and Mr. Wordsworth as representing the Plaintiffs and intervenors in the said District Court proceedings.

8. The cash and notes payable and deliverable to the Liquidator (being the balance of the sums payable under Clause 1 hereof less the said deposit and less the moneys and notes payable as set forth in Clause 2 (a), (b), (c) and (d) shall be paid as to the cash by payment to the Bank of England (Law Courts Branch) for the credit of the Senior Official Receiver in Companies Liquidation and as to the notes by delivery to the agents in Chicago Messrs. J. P. Morgan & Co., 923 Wall Street New York, the Bankers of the Liquidator and payment and delivery of the said cash and notes in this manner shall be a full and sufficient discharge to Mr. Factor for such payment and delivery.

9. This agreement is conditional upon:

(a) Share holders of the Vulcan Company and/or the Rhodesia Company holding not less than 75% in nominal value of the total of the issues capital of both those Companies (including therein the holders of not less than 90% in nominal value of the total of the issued capital of the Vulcan Company and the Rhodesia Company held by those shareholders of those two Companies or either of them who have authorized Mr. Wordsworth or Mr. Lee in writing to act as solicitors for them in this matter whether as Plaintiffs intervenors or as persons supporting the District Court proceedings) signing the memorandum of release attached to the Liquidator's circular (and the said memorandum of release being produced to Mr. Gilbert or his nominee in London for inspection) within 28 days from the date of this Agreement or such extended period as may be agreed in writing between Mr. Gilbert, Mr. Wordsworth and the Liquidator (it being agreed however that shares in the Vulcan Company and the Rhodesia Company to which the Liquidator as Liquidator of Broad Street Press Limited is entitled may be included in determining the said 75 per cent) and

(b) The obtaining by the Liquidator of the approval of the High Court of Justice in England to his entering into

this Agreement within 30 days after the necessary memoranda of release have been obtained under sub-clause 9 (a) above or such extended time as may be agreed in writing between Mr. Gilbert, Mr. Wordsworth and the Liquidator.

(c) If and when Clauses 9 (a) and 9 (b) have been performed, Mr. Lee will as soon as possible procure the entry of an Order of Court for the publication of a notice in a form to be approved by Mr. Lee and Mr. Gilbert or Allan J. Carter (unless such publication shall by mutual consent of Mr. Gilbert and Mr. Lee be dispensed with) and upon the expiration of such period of time as may be fixed by said notice Mr. Gilbert and Mr. Lee will apply for a hearing and decree in the United States District Court, provided however that the date of said hearing shall be at least 30 days after the approval of the High Court of Justice in England referred to under Clause 9 (b) or in the event that such publication is so dispensed with then the application for such hearing and decree will be made within 30 days after the performance of the conditions named in clauses 9 (a) and 9 (b).

(d) A decree in the form initialled simultaneously with the execution of this Agreement by Mr. Gilbert and Mr. [fol. 380] Lee for identification, subject to any alterations to which Mr. Gilbert and Mr. Lee may agree (Mr. Gilbert undertaking hereby to agree on behalf of Mr. Factor and Rella Cohen Factor to any modifications required by the said two Banks for their protection) shall be entered by the said United States District Court. Such decree to be in a form to bind all the clients of Mr. Wordsworth and Mr. Lee who consent to this settlement (including specifically the Plaintiffs Arthur Traviss Faber and Millicent Elizabeth Faber and Adah Hayhurst). The provision with respect to the entry of a decree may however be waived by Mr. Factor at any time before the entry of said decree, such waiver to be given in writing and a copy thereof to be served upon Mr. Lee and a copy thereof deposited in the United States Mail addressed to the Liquidator. If the entry of said decree is waived by Mr. Factor as herein provided, then Mr. Lee and Mr. Wordsworth agree to dismiss the said cause of action as to all parties represented by Mr. Lee or Mr. Wordsworth who have signed the memoranda of release mentioned in sub-clause (a) of Clause 9

of this Agreement and Mr. Lee agrees to withdraw as counsel for all parties that he may represent in said proceedings; in which event the United States District Court shall fix the attorneys' fees, out-of-pocket expenses and costs theretofore incurred in accordance with the terms and provisions of Clause 2 of this contract.

10. Forthwith upon the conditions (a), (b), (c) and (d) in the preceding clause heretofore mentioned being fully performed or upon the conditions (a) and (b) being fully performed and conditions (c) and (d) having been waived by Mr. Factor under the option hereinbefore provided this Agreement shall become final and fully operative. Upon the entry of a decree by the District Court Mr. Factor shall cause the deliveries provided to be made under Clauses 2 (b) and 2 (c) hereof to be made on the next business day following the day on which said decree is enfered (or in the event of the entry of said decree being waived then on the next business day following the date of said waiver), and Mr. Factor shall further cause the sums of money provided to be paid under Clauses 2 (a), 2 (b), 2 (c), 2 (d) and 2 (e) hereof to be made to the parties therein named within 30 days after the date on which said decree is entered or within 30 days after the date upon which such decree may have been waived by Mr. Factor under Clause 9 (d) hereof.

11. If the conditions set forth in Clauses 9 (a) or 9 (b) supra, shall not be fulfilled within the time specified or if without the fault of Mr. Factor or Rella Cohen Factor the District Court shall refuse to enter said Decree as provided in Clause 9 (d) unless said entry of a Decree shall have been waived by Mr. Factor as herein provided then and in any of said events this Agreement shall forthwith become null and void in all respects (except that the Liquidator will forthwith return the deposit of 100,000 dollars to the First Union Trust and Savings Bank to be held by it under the two trusts herein referred to deducting from such payment any costs of conversion and remittance) and thereupon the parties shall revert to the position in which they were immediately prior to the signing of this Agreement, and thereupon in any of said events the Plaintiffs and Intervenors may immediately or as soon thereafter as they may be able to arrange for such resumption resume the taking of the Depositions in London, in which even the Plaintiffs

will attempt to re-call the witness C. Levin for further cross-examination and will attempt to produce the witness West for further examination and cross-examination the Defendants in either case here expressly agreeing however that if the Plaintiffs are not able to produce either of such witnesses then in such event the testimony heretofore given shall not be stricken out on the ground that the Defendants have not had the opportunity of cross-examining such witnesses. It is further agreed that if depositions shall be so resumed the time for the conclusion of the taking of such Depositions on the part of the Plaintiffs shall be extended for 30 days after the resumption of the taking of such Depositions shall have commenced and the time of the Defendants for the conclusion of the taking of their Depositions shall be extended for six weeks from the [fol. 381] date upon which the Plaintiffs shall finish the taking of their Depositions it being agreed that an Order shall be entered in the United States District Court providing for such 30 days additional time for the Plaintiffs and six weeks for the Defendants as hereinbefore stipulated and provided that either party may hereafter ask the Court for further time to complete such depositions of Plaintiffs and Intervenors or Defendants respectively the opposite party reserving the right however to object thereto provided however that nothing contained in this Agreement shall be construed as a waiver or recognition on the part of any of the Defendants in this cause that the plaintiffs or intervenors have any right whatever to take any depositions under the present outstanding commission or otherwise.

12. Mr. Factor expressly renounces any claim he may have to participate in any way in the assets of Broad Street Press Limited or the Vulcan Company or Rhodesia Company (except as mentioned in Clause 4 hereof) either as a creditor or claimant or in respect of any shares held by him or his nominees in Broad Street Press Limited or the Vulcan Company or Rhodesia Company.

13. The parties to this Agreement mutually agree to use their best endeavours and to take all steps and to do all acts and things in their power to comply with the conditions set out in Clause 9 hereof and to make this Agreement final and fully operative and thereafter to carry into effect

the terms of this agreement and particularly Mr. Factor agrees to execute and procure the execution of any documents necessary to enable the two Banks as trustees to make good delivery out of the cash and notes held by them in account of the said two trusts of the cash and notes to be paid and delivered by Mr. Factor under Clauses 1 and 2 hereof.

14. This Agreement has no reference to the pending extradition proceedings involving Mr. Factor and Mr. Green and is without prejudice thereto and on the other hand involves no admission by any person named herein of any liability whether civil or criminal or otherwise howsoever except a liability to perform this Agreement according to its terms.

As witness the hands of the parties.

G. D. Pepys, Senior Official Receiver. John Factor, by George Gale Gilbert, Jr., His Attorney and Duly Authorized Agent. Signed by the said Ralph Wordsworth; John H. S. Lee.

[fol. 382] EXHIBIT A

Broad Street Press Limited, Vulcan Copper Mines Limited and Rhodesia Border Mining Corporation Limited all in compulsory liquidation and George Digby Pepys, the Senior Official Receiver in Companies Liquidation as the Liquidator of each of the said Companies for and in consideration of the sum of $— in hand paid and the receipt of notes secured by first mortgage trust deeds of the face value (including accrued interest) of $— (the receipt whereof is hereby acknowledged) hereby relinquish release and for ever discharge John Factor (sometimes called Jacob Factor) of Chicago, Illinois, Rella Cohen Factor of Chicago, Illinois, Arthur Jack Klein of London, England and Harry Geen (sometimes called Harry Green) of London England, from every claim, demand, contract, promise, right of action, and liability of every kind and character which the said three Companies or any of them or the Liquidator may have or can assert against the above named persons or any of them. And the said three Companies and each of them and the Liquidator hereby further waive and release all claim and right in and to all property of whatsoever kind

character or nature now held by or in the actual custody or possession of the said persons hereinbefore named or the First Union Trust & Savings Bank of Chicago Illinois (as Trustee or otherwise) or Foreman-State Trust & Savings Bank of Chicago, Illinois (as Trustee or otherwise) to which the said three Companies or any of them or the Liquidator is or may claim to be entitled or to which they or any of them could hereafter assert any right in any manner whatsoever.

EXHIBIT B

DEAR SIR (or MADAM):

In the Matter of Broad Street Press, Ltd., in Liquidation. In the Matter of Vulcan Copper Mines, Ltd., in Liquidation. In the Matter of Rhodesia Border Mining Corporation, Limited, in Liquidation

In my capacity as Liquidator of the three above-named Companies, I am addressing this letter to the shareholders of the Vulcan & Rhodesia Companies to ascertain whether they desire me to make the necessary application to the Court to obtain the approval of and to carry into effect an agreement expressed to be made between me as Liquidator of the three above-named Companies; John Factor, sometimes known as Jacob Factor, Ralph Wordsworth and John H. S. Lee for the settlement of the claim which Broad Street Press Limited has against Jacob Factor for the repayment of a sum exceeding £600,000 in respect of moneys received by him out of the Banking account of Broad Street Press Limited, and of all other claims which the three above-named Companies or I, as the Liquidator thereof have against Jacob Factor, Rella Cohen Factor, Arthur Jack Klein and Harry Geen.

Jacob Factor left this country shortly before the date of the Order for the compulsory winding up of Broad Street Press Limited and is at present resident in Chicago beyond the jurisdiction of the Court in this Country.

You will remember that on the 26th August last Messrs. Wordsworth, Marr Johnson & Shaw, Solicitors of 39 Lombard Street London, E. C. 3. sent you a circular letter informing you that Mr. John H. S. Lee, a Chicago lawyer had [fol. 383] filed a Bill in the District Court of the United States for the Northern District of Illinois on behalf of

Arthur Traviss Faber and Adah Hayhurst alleging that they and others had been defrauded by Jacob Factor in connection with the sale of shares in the Vulcan, Rhodesia and other companies and that they were all interested in certain funds alleged to be part of the proceeds of such alleged frauds which were deposited in two Banks in Chicago. The Bill was so framed as to embrace all other persons alleged to have been similarly defrauded.

Substantially, the persons for whose benefit the proceedings in Chicago were instituted and the persons entitled to make claims in the Liquidation of Broad Street Press Limited are the same, namely, the shareholders of the Vulcan and Rhodesia Companies of whom you are one, and the result sought to be achieved by such shareholders by supporting the proceedings in Chicago and proving in the Liquidation of Broad Street Press Limited is the same, namely to recover the sums paid by those shareholders for shares in the Vulcan and Rhodesia Companies.

The proceedings in Chicago are still pending and are being strongly contested on both sides and several attempts to reach a compromise have failed.

As a result, however, of difficult and protracted negotiations, (to which Messrs. Wordsworth & Co., and Mr. Lee as representing the Plaintiffs in the proceedings in Chicago have been parties) the said agreement has now been concluded with the legal advisers of Mr. Factor, which is subject to:

(a) The consent and approval of the Plaintiffs' intervenors and others supporting the proceedings in Chicago and the shareholders of the Vulcan and Rhodesia Companies to the extent indicated below.

(b) The approval of the Agreement by the High Court of Justice in England.

(c) The disposal of the proceedings in Chicago.

The agreement is available for inspection at this office between the hours of 10.0 a. m. and 4.0 p. m. but its main terms can be summarised as follows:

1. Mr. Factor to pay out of the funds deposited with the said Bank $1,000,000 in cash, and mortgage securities to the

face value of $30,000 (equivalent at the present rate of exchange to approximately £360,000 in all) to be applied as follows:

(a) In payment in full of the claims of the original Plaintiffs in the proceedings in Chicago, as the result of whose efforts the funds were discovered and held in the Chicago banks, (this will involve a sum of £5,725).

(b) In payment of Mr. Lee's remuneration and disbursements to be fixed by the Judge of the said District Court (this remuneration is entirely within the discretion of that court; it will probably be fixed on a percentage basis and Mr. Lee informs me that he will ask for an allowance of 20% or more of the above mentioned sum of £360,000) and

(c) The balance to be paid to me as Liquidator of the Broad Street Press Limited.

2. The above balance to be accepted by me as such Liquidator in full satisfaction of all civil claims by the three above-named Companies against Mr. Factor his wife and his associates Mr. A. J. Klein and Mr. H. Geen.

3. The shareholders in the Vulcan and Rhodesia Companies who acquired their shares from or through Broad Street Press Limited (including those persons who so acquired shares in such Companies but may not have received delivery thereof) to be admitted to prove as creditors in the Liquidation of Broad Street Press Limited for the sums paid by them for their shares (less the amounts received or receivable by them by way of return of capital in the liquidations of the Vulcan and Rhodesia Companies).

4. It is an express condition that shareholders in the Vulcan and Rhodesia Companies to the extent of not less than 75% of the issued capital of those Companies (including [fol. 384] therein the holders of 90% of such issued capital held by the shareholders who authorised Mr. Wordsworth or Mr. Lee in writing to act for them in the said proceedings) shall approve the settlement and agree to release Mr. Factor, Mrs. Rella Cohen Factor, Mr. Klein and Mr. Geen from all claims against them or any of them in connection with the dealings of such shareholders with Broad Street Press Limited, either as purchasers of shares in the Vulcan Company and or the Rhodesia Company and/or the As-

bestos & Holdings Trust Limited and/or any other Company.

After consultation with Mr. Wordsworth and Mr. Lee and after careful consideration of all the circumstances I came to the conclusion that it would be in the best interests of the creditors of Broad Street Press Ltd. and the shareholders of Vulcan & Rhodesia Companies to compromise these matters on these terms. I estimate that the amount payable to me under the agreement should enable a distribution of about 5/- in th £ to be made to the creditors of Broad Street Press Limited including the shareholders of the Vulcan & Rhodesia Companies.

I have accordingly entered into the agreement with Mr. Factor under which he has paid me a deposit of $100,000, and under which I have agreed to send out this circular to the shareholders of the Vulcan and Rhodesia Companies, and to recommend them to approve the settlement and to give the release set out in the form attached hereto. I have further agreed that, upon such shareholders approving the settlement to the extent above referred to, I will apply to the High Court for its approval.

If you approve of the proposed settlement, which I recommend you to do, you should sign the form attached to this letter and return it to me in the accompanying envelope.

As the agreement becomes null and void unless the necessary consents of the Vulcan and Rhodesia shareholders are received within a limited number of days it is of the utmost importance there should be no delay on the part of those who approve the proposed compromise in signing and returning the attached form to me.

I am, Dear Sir or Madam, Your Obedient Servant,

G. D. Pepys, Senior Official Receiver.

To be Detached

To the senior official receiver as liquidator of Broad Street Press, Limited, and Vulcan Copper Mines, Ltd., Rhodesia Border Mining Corporation, Ltd. (all in liquidation), 33 Carey Street, London, W. C. 2, and John Factor, sometimes known as Jacob Factor:

I approve of the proposed compromise as explained in the letter, of the Senior Official Receiver dated the 20th July, 1932 and if and when the terms of the agreement

therein mentioned (made between the Senior Official Receiver, John Factor, Ralph Wordsworth and John H. S. Lee on the 19th day of July 1932) are carried into effect, I release Mr. Factor, Mrs. Rella Cohen Factor, Mr. Klein and Mr. Geen from all claims which I have or may have against them or any of them as a result of my dealings with the Broad Street Press Limited, as a purchaser of shares in Vulcan Copper Mines Limited and/or Rhodesia Border Mining Corporation Limited and/or Asbestos & Holding Trust Limited or otherwise and authorize the proceedings in Chicago to be disposed of on the terms of the said agreement.

Dated this — day of ——, 1932.

(Name:) ——. (Address:) ——.

[fol. 385] EXHIBIT C

DEAR SIR (or MADAM):

In the District Court of the United States for the Northern District of Illinois, Eastern Division. Arthur Traviss Faber et al. vs. Foreman-State Trust & Savings Bank et al.

We are sending you this letter under cover of a letter of even date which is being addressed to you by the Senior Official Receiver explaining an Agreement under which, subject to the approval of the shareholders in the Vulcan Copper Mines Limited and the Rhodesia Border Mining Corporation Limited and the High Court as therein mentioned, the proceedings in Chicago referred to in our circular letter to you of the 26th August last are to be settled by the payment of a sum in cash and securities amounting in all to about £360,000. As indicated to you by the Senior Official Receiver the said proceedings have been vigorously pursued and defended. The Defendants have made several unsuccessful efforts to get the proceedings dismissed on technical grounds. Mr. Lee, who has been in London for the last five weeks taking evidence in the said proceedings, is confident that if they have to be continued, he could bring them to a successful conclusion. At the same time, bearing in mind the complexity of the questions involved the litigation might well last for another two years and a number of persons supporting the proceedings have already intimated that they would prefer to share in the distribution of a fund which is now being ascertained, rather than

to take the chance, however good, of recovering a larger sum later on. Accordingly, Mr. Lee recommends you to accept the settlement embodied in the Agreement. We do not hesitate to endorse his recommendation. We have little doubt that you will also accept his advice and that you will join us in congratulating him upon the result of his efforts.

Put quite shortly, the Agreement provides that the sum payable thereunder to the Senior Official Receiver as Liquidator of the Broad Street Press Limited is to be distributed among creditors of that Company. The Agreement also provides that you are to be admitted as one of the creditors of the Company for the sum you paid for your shares in the Vulcan Copper Mines Limited and/or the Rhodesia Border Mining Corporation Limited, less any sum you may receive by way of return of capital in the Liquidations of those Companies.

We desire to make special reference to your position should you have purchased from the Broad Street Press Limited, and still retain, any shares in the Asbestos & Holdings Trust Limited. It is one of the terms of the Agreement that you are to release Mr. Factor, Mrs. Rella Cohen Factor, Mr. Klein and Mr. Geen from any claim you have, or may have, against them or any of them in respect of such shares. If you hold any shares of the Asbestos & Holding Trust Limited purchased as aforesaid, you would be at liberty to file such claim as you might think fit with the Liquidator of the Broad Street Press Limited in respect thereto, but we express no opinion as to the admissibility thereof.

It is an important condition of the Agreement that the holders of not less than 90% of the issued capital of the Vulcan Copper Mines Limited and the Rhodesia Border Mining Corporation Limited held by shareholders who authorized us or Mr. Lee to represent them in the said proceedings shall approve thereof. If, as we certainly anticipate will be the case, the holders of such 90% do approve the settlement, we shall do all we can to get the settlement [fol. 386] carried out as quickly as possible, in which event and in the interests of the great majority of the shareholders who will have approved the settlement, Mr. Lee would be compelled to withdraw as Attorney for any persons who had failed to approve the settlement, or objected thereto,

leaving such persons to take such action as they think fit. On the other hand, unless 90% of the shareholders above referred to promptly approve the settlement, the said proceedings would be continued as vigorously as heretofore in which event, however, we should be obliged to ask for a further contribution towards the costs, charges and expenses thereof. The contribution already made has been carefully husbanded, and only used for essential disbursements, but the out-of-pocket expenses of the proceedings, especially the costs of taking the evidence, have been a good deal heavier than we had reason to anticipate. If the settlement is approved and carried through, you will get back in full any contribution which you have made towards the costs of the proceedings in addition to your share of the moneys to be paid under the said agreement.

Finally, we should like to emphasize that, if the settlement is to be made, it is of the utmost importance that it should be made promptly, and if you are in favour of the settlement, we would ask you to sign and return to the Senior Official Receiver the memorandum of release which is set out at the foot of his letter.

Yours faithfully, (Sgd.) Wordsworth, Marr, Johnson & Shaw.

I have read and approve the above letter and strongly recommend you to accept the settlement.

(Sgd.) John H. S. Lee.

September 17, 1932.

Mr. John Factor, c/o Levinson, Becker, Gilbert, Peebles & Swiren, 1 North La Salle Street, Chicago, Illinois.

Dear Sir: The undersigned, M. D. Follansbee, as the agent in Chicago of J. P. Morgan & Co., 23 Wall Street, New York, and John H. S. Lee, in pursuance of the provisions of a Settlement Agreement entered into by you, Pepys, as Senior Official Liquidator, Ralph Wordsworth, and the undersigned Lee, dated July 19, 1932, hereby select the following described mortgages having an aggregate face value, including accrued interest to September 24, 1932 of $299,953.88, to be delivered as provided in said Settlement Agreement for the $300,000 of mortgages therein provided to be delivered in accordance with the terms thereof:

[fol. 387] Maker		Amount
Joseph and Emma Valle:		
Principal	$5,700.00	
Accrued interest to September 24, 1932	99.75	
		$5,799.75
Frank and Vita Monzulo:		
Principal	$5,800.00	
Accrued interest to September 24, 1932	158.13	
		5,958.13
Boleslew and Olympia Zaleski:		
Principal	$50,000.00	
Accrued interest to September 24, 1932	1,575.00	
		51,575.00
Liberty Trust & Savings Bank, as Trustee:		
Principal	$40,000.00	
Accrued interest to September 24, 1932	726.66	
		40,726.66
Mariano Camplone et al.:		
Principal	$6,175.00	
Accrued interest to September 24, 1932	84.39	
		6,259.39
Louise B. Dodge et al.:		
Principal	$28,500.00	
Accrued interest to September 24, 1932	722.80	
		29,222.80
Charles and Nina Meyering:		
Principal	$50,000.00	
Accrued interest to September 24, 1932	1,325.00	
		51,325.00
Harry H. and Pansy Talcott:		
Principal	$9,500.00	
Accrued interest to September 24, 1932	212.17	
		9,712.17
Leroy Blakley:		
Principal	$15,000.00	
Accrued interest to September 24, 1932	380.00	
		15,380.00
Harrison and Nellie Southworth:		
Principal	$6,500.00	
Accrued interest to September 24, 1932	196.83	
		6,696.83
Joseph and Hannah Drell:		
Principal	$45,000.00	
Accrued interest to September 24, 1932	172.51	
		45,172.51
Bernard F. and Mary V. Johnston:		
Principal	$5,650.00	
Accrued interest to September 24, 1932	90.40	
		5,740.40
James T. and Margaret Flynn:		
Principal	$16,000.00	
Accrued interest to September 24, 1932	105.11	
		16,105.11
Leo and Dorothy S. Ginsburg:		
One-fifth of total mortgage	$10,000.00	
One-fifth of accrued interest to September 24, 1932	310.13	
		10,310.13
Grand Total		$299,953.88

We agree that said mortgages, totaling $299,953.88 will be accepted, together with the sum of $46.22 in cash, in full satisfaction of the obligation to deliver $300,000 in mortgages under the terms of said Settlement Agreement.

We further agree, as to the mortgage in which we are accepting a partial interest of $10,000, that this mortgage may be split by dividing the one existing note into two notes, one for $10,000, which will be accepted by us, and one for $40,000, to be retained in the trusts, and by splitting the interest notes accordingly, and in similar proportion. If for any reason it is impracticable or is considered inadvisable by the trustee holding said mortgage in its said trust to split the notes, said mortgage may continue to be held by such trustee subject to the joint order of the undersigned and Rella Cohen Factor and John Factor, or if no joint orders are given concerning said mortgage, said trustee shall hold and collect to the best of its ability all amounts due thereon from time to time and divide said amounts so collected between the undersigned and Rella Cohen Factor in the same proportion that $10,000 bears to $40,000, after deducting the reasonable fees and expenses of said trustee in connection with said mortgage. If said mortgage is so held, the trustee so holding it shall not be under any liability to anyone in connection therewith, except for its own bad faith.

Very truly yours, M. D. Follansbee, Agent in Chicago of J. P. Morgan & Co. John H. S. Lee.

[fol. 388] Mr. Kearns:

Q. Will you produce a certified copy of the English Court order—mark that Defendants'—mark it Trustees' Exhibit No. 5.

I hand you pages 73 to 78 of the Trustees' counter-claim herein and ask if that is substantially a true copy of the Trustees' Exhibit 5?

A. It is.

Mr. Kearns: I offer in evidence Trustees' Exhibit No. 5, and ask that the copy attached to the counter-claim stand in lieu thereof.

The Court: It may be admitted.

(Said document so offered and received in evidence was thereupon marked Trustees' Exhibit No. 5, and is in words and figures as follows, to-wit:)

[fol. 389] TRUSTEES' EXHIBIT 5

"English Court Order"

GREAT BRITAIN & IRELAND,
London, England,
Consulate General of the United States of
America, ss:

I, John F. Claffey, Vice Consul of the United States of America residing at London, England do hereby make known and certify to all whom it may concern that John D. Venn, who hath signed the annexed Certificate, is a Notary Public duly admitted and sworn and practising in the city of London, England and that to all acts by him so done full faith and credit are and ought to be given in Judicature and thereout.

In testimony whereof I have hereunto set my hand and affixed my seal of Office at London aforesaid, this 9th day of August in the year of our Lord One Thousand Nine Hundred and Thirty-two.

J. F. Claffey, John F. Claffey, Vice-Consul of the United States of America at London, England. (Seal.)

Service No. 8030. 12/ 8s-4d . Fee: $2. GN. H. De Pinna and John Venn, Notaries Public & Translators of Languages, Gresham House Court, 38, Gresham House, Old Broad Street, London, E. C. 2. Telephones: London, Wall 0506-0507. And at Whitehall House, Whitehall, London, S. W. 1. Telephones: ——. John Dalton Venn, H. A. Woodbridge, H. Peter Venn, John Venn. (One Shilling Stamp.)

I, John Dalton Venn, of the City of London, Notary Public, duly admitted and sworn, practising in the said City, do hereby certify and attest that the signature "C. F. Pryke" set and subscribed to the hereunto annexed Certificate marked "A" is truly that of Charles Frederick Pryke, Clerk in the Filing and Record Department, Companies Court Office, of the Supreme Court of Judicature, England.

That the signature "Frank Mellor" also set and subscribed to the hereunto annexed Certificate marked "B" is truly that of Frank Mellor, Registrar in Companies Court

having the superintendence and control of the said Companies Court Office.

[fol. 390] And that the Seal impressed on the said Certificate is the genuine Seal of the Supreme Court of Judicature, England, and that to all documents so sealed and signed full faith and credit may and ought to be given in Courts of Judicature and thereout.

In Testimony whereof I have hereunto set my hand and affixed my Seal of Office in the City of London aforesaid, this eighth day of August One thousand nine hundred and thirty-two.

John D. Venn, Notary Public, London. (Seal.)

"A"

I hereby certify that the Document hereto annexed is a true copy of the Record filed in the Companies Court Office of the Supreme Court of Judicature in England and legally kept in the custody of the Registrar of the said Court.

C. F. Pryke, Clerk in the Filing and Record Department Companies Court.

Judicature Fees: Five Shillings.

"B"

This is to certify that the above Charles Frederick Pryke is the Officer in charge of the documents filed in the Companies Court Offices of the Supreme Court of Judicature on which file is the document of which the above is certified to be a true copy and that he is the proper Officer to testify to the correctness of such copy.

Dated this 8th day of August, 1932.

Frank Mellor, Registrar in Companies Court Having the Superintendence and Control of the Companies Court Office. (Seal.)

[fol. 391] Judicature Fees: Stamp.
Judicature Fees: Stamp.

In the High Court of Justice, Chancery Division, Companies Court

Mr. Justice Goddard Sitting as Vacation Judge (in Chambers) Thursday, the 4th Day of August 1932

00677 of 1930, 00719 of 1930, 00720 of 1930

In the Matter of Broad Street Press, Limited, and in the Matter of The Vulcan Copper Mines, Limited, and in the Matter of The Rhodesia Border Mining Corporation, Limited, and in the Matter of the Companies Act, 1929

Upon the application by Summons dated the 3rd August 1932 of George Digby Pepys the Senior Official Receiver and Liquidator of the above named Companies and upon hearing the Solicitors for the Applicant and for Ralph Wordsworth and Counsel for Edith Oerum respectively respondents to the said Summons and upon reading the Orders to wind up the said Companies dated the 10th 24th and 24th November 1930 respectively the two affidavits of George Digby Pepys filed respectively the 29th July 1932 and the 3rd August 1932 in the matter of the first above mentioned Company and the exhibits in the said Affidavits referred to it is ordered that the Agreement dated the 19th July 1932 and made between the applicant of the first part Jacob Factor of the second part Ralph Wordsworth of the third part and John Henry Sheldon Lee of the fourth part (which agreement is more particularly referred to in Exhibit A to the first above mentioned Affidavit) and the intended compromise thereby effected be and the same is hereby approved and the applicant is to be at liberty to carry the same into effect.

And this court doth direct that the said George Digby Pepys or other the liquidator of the said Companies for the time being be represented at the District Court of the United States for the Northern district of Illinois, Eastern Division upon any application where the question of the remuneration of the said John Henry Sheldon Lee under the said Agreement comes up for consideration.

Frank Mellor, Registrar. (L. S.)

No. 00677 of 1930, No. 00719 of 1930, No. 00720 of 1930. In the High Court of Justice, Chancery Division, Companies Court. Mr. Justice Goddard. Re Broad Street Press, Limited, & Ors. and re the Companies Act, 1929. Order. (Completed 5 Aug. 1932. Frank Mellor Registrar.) Office copy Supreme Court of Judicature.

[fol. 392] Mr. Kearns:

Q. One of the terms of that settlement agreement, Trustees' Exhibit No. 4, provides a down payment of $100,000, does it not?

A. It does.

Q. Was that payment made?

A. It was made on the 20th day of July, 1932, by my depositing and handing to George Bigby Pepys a certified check in the sum of $28,040 pounds sterling, 13 shillings and 2 pence, which was the equivalent of $100,000 on that day at the finest exchange rate prevailing in London.

Q. That settlement agreement provides that it shall only be effective when shareholders of certain concerns in certain amounts have approved it, does it not?

A. That is true.

Q. Will you state whether shareholders in the requisite amounts have approved that agreement, and will you also state what the amounts of such approvals are?

A. Before sailing from London for New York on August 6, 1932, I had personally checked the assents of more than 75 per cent of the whole number of purchasers of Rhodesia Border Mining Corporation, Vulcan Copper Mining Company, Limited, shareholders, and I found that 90 per cent of those parties, more than 90 per cent of those parties, were [fol. 393] represented by Mr. Lee and Mr. Wordsworth.

The contract provides that before it became fully operative that at least 75 per cent of the total in number, not in number, but in amount of shareholdings, should assent.

Prior to that time I had personally ascertained that more than 75 per cent of the total and slightly more than 90 per cent of Mr. Lee and Mr. Wordsworth's clients had so assented. I saw the original written assents signed by the parties. Since that time I have received weekly cable communications of persons who have assented since August 6, 1932, and the last information I have was on September 2, 1932, at which time 96.9 per cent of all the shareholders in

amounts of Vulcan and Rhodesia companies had assented, and 99.5 per cent, Lee-Wordsworth clients, had assented. I have their names if you want them.

Q. The settlement agreement, Trustees' Exhibit No. 4, was executed by you as attorney and agent for Mr. Factor?

A. It was.

Q. Mr. Factor authorized you to execute that on his [fol. 394] behalf before you signed?

A. He did.

Mr. Kearns: Any cross-examination.

Mr. Gilbert: No.

Mr. Kearns: I offer in evidence as Trustees' Exhibit 6, a certificate of the Chicago Daily Law Bulletin of the publication of the notice under the order that was entered in this cause.

I also offer in evidence as Trustees' Exhibit No. 7, a letter from—perhaps I had better be sworn myself on this, if the Court will permit—it is Morgan & Company, the agent in Chicago of J. P. Morgan & Company, are directed under the terms of the settlement agreement to be the recipient of deliveries of securities due to the British receiver.

I have here the original letter from J. P. Morgan & Company designating Mitchell D. Folansbe as their agent in Chicago for all purposes of that settlement agreement.

May this be admitted?

The Court: Is there any objection?

Mr. Healy: No objection.

(Whereupon the documents so offered and received in evidence were marked Trustees' Exhibits Nos. 6 and 7, [fol. 395] and are in words and figures as follows, to-wit:)

[fol. 396] TRUSTEE'S EXHIBIT 6

"Certificate of Publication"

Law Bulletin Publishing Co., a corporation organized and existing under and by virtue of the laws of the State of Illinois, does hereby certify that it is the publisher of the Chicago Daily Law Bulletin; that said Chicago Daily Law Bulletin is a secular newspaper and has been published daily in the City of Chicago, County of Cook and State of Illinois, continuously for more than six months prior to, on

and since the date of the first publication of the notice hereinafter referred to and is of general circulation throughout said County and State.

That a notice, of which the annexed printed slip is a true copy, was published three times in said Chicago Daily Law Bulletin, namely, once in each week for three successive weeks and that the first publication of said notice as aforesaid was made in said newspaper, dated and published on the 26th day of August, A. D. 1932, and the last publication thereof was made in said newspaper dated and published on the 9th day of September, A. D. 1932.

In witness whereof, the undersigned, the said Law Bulletin Publishing Co., has caused this certificate to be signed by Henry W. Ewing, its President, and attested and its corporate seal affixed hereto by H. J. Macfarland, its Secretary, at Chicago, Illinois, this 9th day of September, A. D. 1932.

Law Bulletin Publishing Co., by Henry W. Ewing, President.

Attest:

H. J. Macfarland, Secretary. (Seal.)

(Publication Fee, $14.70.)

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity, No. 10538

ARTHUR TRAVISS FABER et al.

vs.

FOREMAN STATE TRUST & SAVINGS BANK et al.

All persons, firms and corporations are hereby notified that a suit in equity entitled as above was filed in this Court asserting that John Factor, sometimes called Jacob Factor, had wrongfully secured funds and monies and properties of the named plaintiffs and of other persons, which property is alleged to have been deposited by said Factor with some of the other defendants in said cause. All persons, firms and or corporations having or claiming to have any right, title, or interest in or to any of the monies, funds,

securities or other properties involved in said cause or having or claiming to have any right or claims growing out of the business or dealings of Tyler, Wilson & Co., Ltd., and/or Broad Street Press, Limited, or any of their respective officers or agents, are notified that they and each of them, if any, may make application to intervene in this suit and to assert any such rights or claims provided the said application to intervene is made to the Court prior to the 19th day of September, 1932, that otherwise they and all such persons, firms and/or corporations, if any, shall be forever barred from asserting any right, title, claim or interest in or to any of such monies, funds, securities and property, and shall be barred from making any claims against any of the parties to this action by reason of any matter or thing growing out of the subject matter of this suit and shall be by the decree of this court forever enjoined and restrained from asserting any such rights or claims, if any, in and to any and all of said monies, funds, securities and properties involved in this cause and from suing or in anywise asserting any claims against or molesting any of the parties to this cause by reason of any matter or thing involved in this suit.

Charles M. Bates, Clerk.

Aug. 26, 29.

Endorsed: 10538. District Court of United States. Faber vs. Foreman-State Trust & Savings Bank. Certificate of Publication from Chicago Daily Law Bulletin.

[fol. 397] TRUSTEE'S EXHIBIT 7.

J. P. Morgan & Co., Wall St. Corner Broad, New York. Drexel & Co., Philadelphia. Morgan Grenfell & Co., London. Morgan & Cie., Paris

New York, September 21, 1932.

Mitchell D. Follansbee, Esq., 120 South La Salle Street, Chicago, Illinois.

DEAR SIR: There is attached hereto a copy of a certain Agreement dated July 19, 1932, between George Digby Pepys, George Gale Gilbert, Jr., as Attorney and Agent for

John Factor, Ralph Wordsworth, and John H. S. Lee. In the aforesaid contract certain duties devolve upon this firm.

We hereby designate and appoint you as our agent to do and perform all things requisite and necessary to be done and performed by our agent under the aforesaid Agreement, as fully to all intents and purposes as if personally done by us, with full authority to make and sign any papers requisite.

Yours very truly, J. P. Morgan & Co.

Enclosure.

[fol. 398] Copy

This agreement is made the 19th day of July, 1932, between George Digby Pepys the Senior Official Receiver in Companies Liquidation (hereinafter referred to as "the Liquidator") in his capacity as Liquidator of Broad Street Press Limited and also where so stated in his capacity as Liquidator of the Vulcan Copper Mines Limited (hereinafter referred to as "the Vulcan Company") and also where so stated in his capacity as Liquidator of Rhodesia Border Mining Corporation Limited (hereinafter referred to as "the Rhodesia Company") of the first part John Factor (sometimes known as Jacob Factor and hereinafter referred to as "Mr. Factor") acting by George Gale Gilbert Junior his duly authorized Agent of the second part Ralph Wordsworth a member of the firm of Wordsworth Marr Johnson & Shaw of 39 Lombard Street in the City of London (hereinafter referred to as "Mr. Wordsworth") of the third part and John Henry Sheldon Lee (hereinafter referred to as "Mr. Lee") of the fourth part whereas Broad Street Press Limited and the Liquidator as its Liquidator have certain claims against Mr. Factor one Arthur Jack Klein and one Harry Geen (sometimes known as Harry Green) in respect of matters arising out of the affairs of Broad Street Press Limited and whereas Mr. Lee is acting as Solicitor for the Plaintiffs and the intervenors in certain proceedings pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, the short title of which proceedings is Arthur Traviss Faber et al. v. Foreman-State Trust & Savings Bank et al. In Equity No. 10538 in which Mr. Factor is a defendant and in which proceedings the Plaintiffs make certain claims against Mr. Factor which appear from the

Second Amended Bill of Complaint filed in those proceedings instituted on the 16th day of May, 1931, and whereas Mr. Wordsworth was instrumental in obtaining the intervention of the intervenors in the said proceedings and [fol. 399] whereas two of the other Defendants in the said proceedings namely the Foreman State Trust & Savings Bank and the First Union Trust & Savings Bank (hereinafter referred to collectively as "the two banks") hold cash and securities in the account of two certain trusts in which Mr. Factor is interested as settlor and beneficiary which Mr. Factor represents are of an aggregate value sufficient to provide thereout notes secured by first mortgage trust deeds (hereinafter referred to as "notes") of the aggregate face value including accrued interest of 200,000 dollars and 1,000,000 dollars in cash and whereas it has been agreed between the Liquidator and Mr. Factor that all claims by Broad Street Press Limited the Vulcan Company and the Rhodesia Company and the Liquidator as the Liquidator thereof against Mr. Factor shall be compromised on and subject to the terms and conditions hereinafter appearing which include the taking of a decree in the said proceedings in the said District Court (referred to hereafter as "the District Court proceedings") as hereinafter mentioned now in consideration of the mutual covenants and agreements herein contained it is hereby agreed and declared as follows:

1. Mr. Factor shall pay and deliver or cause to be paid and delivered in the manner hereinafter appearing:

(a) the sum of 100,000 dollars in cash from the funds of the said two trusts (hereinafter referred to as "the deposit")

(b) the sum of 900,000 dollars from the funds of the said two trusts and

(c) notes secured by first mortgage trust deeds of the aggregate face value including accrued interest of 200,000 dollars such notes to be selected jointly by a party to be nominated by the Liquidator and Mr. Lee from the whole of the said Notes held by the two Banks.

said payments and deliveries to be paid and accepted in full satisfaction and discharge of all civil claims by the

Broad Street Press Limited the Vulcan Company or the [fol. 400] Rhodesia Company and the Liquidator as the Liquidator thereof against Mr. Factor, Rella Cohen Factor, Mr. Klein and Mr. Geen.

2. In the event of this Agreement becoming final and fully operative as provided in Clause 10 hereof the money provided to be paid and the notes provided to be delivered by virtue of Clause 1 hereof shall be paid out and distributed as follows: (a) the Court costs of the Plaintiffs and Intervenors (it being provided in the Plaintiffs' second amended Bill of Complaint in said cause that all parties similarly situated may intervene in such suit by paying their pro rata share of the expenses thereof) all out of pocket expenses of Mr. Lee and Mr. Wordsworth and of the Plaintiffs and Intervenors and their other Solicitors in England (including the travelling expenses of the Plaintiffs their solicitors and attorneys) and the expenses of taking depositions, all as established by the itemized signed statements of account to be presented to the United States District Court upon the entry of the decree hereinafter mentioned shall first be paid only out of the moneys mentioned in Clause 1 hereof to Mr. Lee and shall be repaid by Mr. Lee to the persons entitled thereto. Any decree hereinafter mentioned shall provide for the payments hereinbefore described. (b) The attorneys' fees of Mr. Lee shall after hearing first had thereon as hereinafter provided be fixed and allowed to the Plaintiffs and Intervenors in said cause pending in the United States District Court for the Northern District of Illinois and shall be charged only against the money and securities mentioned in Clause 1 hereof and shall be paid to Mr. Lee as follows: Three-thirteenths thereof in notes and ten-thirteenths thereof in cash such attorneys' fees to include upon proper proof thereof such legal services as have been rendered to Mr. Lee and which Mr. Lee has obligated himself to pay. The provision herein that attorneys' fees are to be allowed to the Plaintiffs and Intervenors instead of to Mr. Lee direct shall not affect the right of anyone to object and be heard [fol. 401] thereon by the Court as to the amount of said attorneys' fees. The said decree of the Court hereinbefore and hereinafter mentioned shall contain the provisions of this clause as to the payment of attorneys' fees. The at-

torneys' fees to be so fixed and determined by the Court shall be fixed upon the basis that the services have been rendered on a contingent fee basis; the hearing or hearings thereon shall be held in chambers; the depositions heretofore taken in said cause, if offered or read, and any other evidence offered or considered upon such hearing or hearings shall with the consent of the Court be impounded, suppressed and sealed up by the Court; expert witnesses, if any, shall be limited to three on each side unless otherwise ordered by the Court; if the letter of Mr. Wordsworth's Firm dated August 26th 1931 shall be considered competent material and relevant by the Court upon such issue, then his testimony by way of Affidavit (a copy whereof has been initialled by Mr. Gilbert and Mr. Lee for the purposes of identification) with respect thereto may be admitted. (c) The next payment which shall be made from said moneys mentioned in Clause 1 hereof shall be made by draft of the First Union Trust and Savings Bank on the Bank of England in the sum of £4,525 payable to Tamplin Joseph Ponsonby Ryde and Flux London solicitors for Arthur Traviss Faber and Millicent Elizabeth Faber and said draft shall be delivered to Mr. Lee who shall concurrently therewith deliver to Mr. Gilbert upon behalf of Mr. Factor a release signed by said Arthur Traviss Faber and Millicent Elizabeth Faber which said release has heretofore been initialled by Mr. Lee and Mr. Gilbert for identification and the decree herein mentioned shall so provide. (d) The next payment which shall be made from said moneys mentioned in Clause 1 hereof shall be made by draft of the said First Union Trust and Savings Bank on the Bank of England in the sum of £1,200 payable to Tamplin Joseph Ponsonby [fol. 402] Ryde and Flux London solicitors for Adah Hayhurst and said draft shall be delivered to Mr. Lee who shall concurrently therewith deliver to Mr. Gilbert upon behalf of Mr. Factor a release signed by said Adah Hayhurst which said release has heretofore been initialled by Mr. Lee and Mr. Gilbert for identification and the decree herein mentioned shall so provide. (e) The cash and notes remaining after the delivery and payment of the moneys and notes set forth in Clauses 2 (a), 2 (b), 2 (c) and 2 (d) shall be paid to the Liquidator as more particularly provided under Clause 8 hereof and the Liquidator agrees to accept such balance (after taking into account the said deposit of

100,000 Dollars) in full satisfaction and discharge of all civil claims by the Broad Street Press Limited, the Vulcan Company and the Rhodesia Company and the Liquidator as the Liquidator thereof against Mr. Factor, Rella Cohen Factor, Mr. Klein and Mr. Geen personally and upon the payment of said sums and the delivery of said notes the Liquidator undertakes and agrees concurrently therewith and in consideration therefor (1) to sign a release and deliver the same to Mr. Factor in the form annexed hereto and marked Exhibit A (2) to deliver to Mr. Gilbert on behalf of Mr. Factor the transfers referred to in Clause 4 hereof (3) to deliver to Mr. Gilbert on behalf of Mr. Factor all memoranda of release signed by the shareholders referred to in Clause 9 (a) hereof which may at any time be received by him (4) to undertake and agree that all proceedings in the pending action by the Broad Street Press Limited against Mr. Klein (1932 B. No. 170) to recover certain Bonds in the State of San Paulo Coffee Realisation Loan 1930 and moneys alleged to belong to the Broad Street Press Limited are to be stayed and settled on the terms that the said Bonds and/or cash representing the same now standing in the joint names of Mr. Wordsworth and Mr. Leonard William Fyson be released to Mr. Klein and that each party pay his own costs of the said action;

[fol. 403] Provided always that notwithstanding anything contained in this Agreement Broad Street Press Limited and the Liquidator as its Liquidator expressly reserve all rights which they or either of them may have to prosecute or commence and prosecute any proceedings in the English Courts against any other person firm or Company now within the jurisdiction of the High Court of Justice in England to recover any money property or other assets claimed by the Liquidator as being assets of Broad Street Press Limited and particularly (a) certain pending proceedings in the High Court of Justice Companies Court against one Herbert John Spellen the short title whereof is re Broad Street Press Limited and re The Companies Act 1929 No. 00677 of 1930 (b) certain pending proceedings relating to various securities which stood in the name of Samuel Fraser the short title whereof is as above and (c) a claim against one Augustus Young in respect of certain securities sold by the said Augustus Young on be-

half of Broad Street Press Limited in or about October 1930. It is further agreed that the said Broad Street Press Limited and the Liquidator as its Liquidator will not seek in any such proceedings to secure any personal judgment against Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen or to reach any money property or assets now in the hands of Mr. Factor, Rella Cohen Factor, Mr. Klein, Mr. Geen or the Defendant Banks in the aforesaid cause of Faber et al. versus Foreman-State Trust & Savings Bank et al. or any proceeds of any such property or assets. Mr. Factor, Rella Cohen Factor, Mr. Klein and/or Mr. Geen may intervene and Mr. Factor may be added as a Defendant if the Court shall so order in any such proceedings however and in the event of the Court deciding that any money property or other assets claimed in any such proceedings are the property of Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen, the Liquidator will not claim any right or take any steps to prevent any such [fol. 404] property money or other assets being paid or transferred to Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen or any one or more of them.

3. The Liquidator will as soon as practicable despatch to each shareholder of the Vulcan Company and the Rhodesia Company (who bought his or her shares in either or both of those Companies from or through Broad Street Press Limited) a letter in the form annexed hereto and marked Exhibit "B" (hereinafter referred to as "the Liquidator's circular") and the Liquidator will admit proofs by each such shareholder in the Vulcan Company and each such shareholder in the Rhodesia Company as creditors in the liquidation of Broad Street Press Limited for the sum or sums paid by him or her for the purchase of his or her shares in the Vulcan Company and/or the Rhodesia Company (less the total amounts (if any) received by him or her by way of return of capital in the liquidations of the Vulcan Company and/or the Rhodesia Company) and also by all persons who contracted with and made payment to the Broad Street Press Limited for shares in the Vulcan Company and/or the Rhodesia Company but did not receive delivery of such shares.

4. The Liquidator as Liquidator of the Vulcan Company and the Rhodesia Company respectively will procure those

Companies to transfer to Mr. Factor or his nominee (but without giving any covenants or warranties for title or otherwise) such interest (if any) as the Vulcan Company and the Rhodesia Company may have in the mining rights or claims alleged by the Vendors thereof to have been contracted to be purchased by the Vulcan Company and/or the Rhodesia Company (drafts whereof have been initialed by the Liquidator and Mr. Gilbert for the purpose of identification). The Liquidator has already rejected proofs by the Vendors of such mining rights or claims in the liquidations of the Vulcan and Rhodesia Companies for the balance of the purchase considerations payable under [fol. 405] the alleged contracts for sale and purchase and the foregoing provision is without prejudice to the contention of the Liquidator that (inter alia) the said two Companies acquired no rights of any value in the said mining rights or claims and shall not preclude the Liquidator from maintaining that attitude and resisting the appeals by such Vendors from the rejection of their proofs by the Liquidator.

5. Mr. Wordsworth and Mr. Lee will as soon as practicable despatch to each of the Plaintiffs and intervenors and all other parties who have authorised them or either of them in writing to act on their behalf a letter in the form attached hereto marked Exhibit "C".

6. Mr. Wordsworth undertakes and agrees that after this Agreement has been completed and the payments made as provided under Clauses 1 and 2 hereof he will not directly or indirectly represent or counsel with anyone who may assert any claim or claim any right against Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen in connection with any transactions involving the Broad Street Press Limited or otherwise except to the extent provided in Clause 2 hereof. Mr. Lee undertakes and agrees that after this Agreement has been completed and the payments made as provided under Clauses 1 and 2 hereof he will not directly or indirectly represent or counsel with anyone who may assert any claim or claim any right against Mr. Factor, Rella Cohen Factor, Mr. Klein or Mr. Geen on any account or against any other person or persons in connec-

tion with any transactions involving the Broad Street Press Limited.

7. On the signing and exchange of this Agreement Mr. Factor has paid to the Liquidator a deposit of 100,000 dollars as provided in Clause 1 (a) hereof on account and in part payment of the total sum payable under Clause 1 [fol. 406] hereof and the Liquidator acknowledges receipt of the said deposit and agrees to hold the sterling equivalent thereof converted on the day of its receipt by him as a deposit under the terms of this Agreement. The said deposit shall be returnable by the Liquidator as hereinafter specified to the First Union Trust & Savings Bank in certain events hereinafter specified but in the event of this Agreement becoming final and fully operative in accordance with Clause 10 hereof the said deposit shall be immediately applied to the total payments to be received by the Liquidator hereunder and if by reason of any default on the part of Mr. Factor or any failure by him to procure the terms to be performed by him to be carried into effect in accordance with the provisions of this Agreement or if the payments to be made by Mr. Factor under this Agreement are not paid within the time hereby limited said deposit shall be forfeited to the Liquidator. In the event of the said deposit being forfeited as aforesaid the Liquidator will retain one half part thereof as Liquidator of the Broad Street Press Limited and will forthwith pay the other half part to the joint account of Mr. Lee and Mr. Wordsworth as representing the Plaintiffs and intervenors in the said District Court proceedings.

8. The cash and notes payable and deliverable to the Liquidator (being the balance of the sums payable under Clause 1 hereof less the said deposit and less the moneys and notes payable as set forth in Clause 2 (a), (b), (c) and (d) shall be paid as to the cash by payment to the Bank of England (Law Courts Branch) for the credit of the Senor Official Receiver in Companies Liquidation and as to the notes by delivery to the Agents in Chicago of Messrs. J. P. Morgan & Co., of 23 Wall Street, New York, the Bankers of the Liquidator and payment and delivery of the said cash notes in this manner shall be a full and

sufficient discharge to Mr. Factor for such payment and [fol. 407] delivery.

9. This Agreement is conditional upon:

(a) Shareholders of the Vulcan Company and/or the Rhodesia Company holding not less than 75% in nominal value of the total of the issued capital of both those Companies (including therein the holders of not less than 90% in nominal value of the total of the issued capital of the Vulcan Company and the Rhodesia Company held by those shareholders of those two Companies or either of them who have authorized Mr. Wordsworth or Mr. Lee in writing to act as solicitors for them in this matter whether as Plaintiffs intervenors or as persons supporting the District Court proceedings) signing the memorandum of release attached to the Liquidator's circular (and the said memoranda of release being produced to Mr. Gilbert or his nominee in London for inspection) within 28 days from the date of this Agreement or such extended period as may be agreed in writing between Mr. Gilbert, Mr. Wordsworth and the Liquidator (it being agreed however that shares in the Vulcan Company and the Rhodesia Company to which the Liquidator as Liquidator of Broad Street Press Limited is entitled may be included in determining the said 75 per cent) and

(b) The obtaining by the Liquidator of the approval of the High Court of Justice in England to his entering into this Agreement within 30 days after the necessary memoranda of release have been obtained under sub-clause 9 (a) above or such extended time as may be agreed in writing between Mr. Gilbert, Mr. Wordsworth and the Liquidator.

(c) If and when Clauses 9 (a) and 9 (b) have been performed, Mr. Lee will as soon as possible procure the entry [fol. 408] of an Order of Court for the publication of a notice in a form to be approved by Mr. Lee and Mr. Gilbert or Allan J. Carter (unless such publication shall by mutual consent of Mr. Gilbert and Mr. Lee be dispensed with) and upon the expiration of such period of time as may be fixed by said notice Mr. Gilbert and Mr. Lee will apply for a hearing and decree in the United States District Court, provided however that the date of said hearing

shall be at least 30 days after the approval of the High Court of Justice in England referred to under Clause 9 (b) or in the event that such publication is so dispensed with then the application for such hearing and decree will be made within 30 days after the performance of the conditions named in clauses 9 (a) and 9 (b).

(d) A decree in the form initialled simultaneously with the execution of this Agreement by Mr. Gilbert and Mr. Lee for identification, subject to any alterations to which Mr. Gilbert and Mr. Lee may agree (Mr. Gilbert undertaking hereby to agree on behalf of Mr. Factor and Rella Cohen Factor to any modifications required by the said two Banks for their protection) shall be entered by the said United States District Court. Such decree to be in a form to bind all the clients of Mr. Wordsworth and Mr. Lee who consent to this settlement (including specifically the Plaintiffs Arthur Traviss Faber and Millicent Elizabeth Faber and Adah Hayhurst). The provision with respect to the entry of a decree may however be waived by Mr. Factor at any time before the entry of said decree, such waiver to be given in writing and a copy thereof to be [fol. 409] served upon Mr. Lee and a copy thereof deposited in the United States Mail addressed to the Liquidator. If the entry of said decree is waived by Mr. Factor as herein provided, then Mr. Lee and Mr. Wordsworth agree to dismiss the said cause of action as to all parties represented by Mr. Lee or Mr. Wordsworth who have signed the memoranda of release mentioned in sub-clause (a) of Clause 9 of this Agreement and Mr. Lee agrees to withdraw as counsel for all parties that he may represent in said proceedings; in which event the United States District Court shall fix the attorneys' fees, out-of-pocket expenses and costs theretofore incurred in accordance with the terms and provisions of Clause 2 of this contract.

10. Forthwith upon the conditions (a) (b) (c) and (d) in the preceding clause heretofore mentioned being fully performed or upon the conditions (a) and (b) being fully performed and conditions (c) and (d) having been waived by Mr. Factor under the option hereinbefore provided this Agreement shall become final and fully operative. Upon the entry of a decree by the District Court Mr. Factor shall cause the deliveries provided to be made under Clauses

2 (b) and 2 (c) hereof to be made on the next business day following the day on which said decree is entered (or in the event of the entry of the said decree being waived then on the next business day following the date of such waiver) and Mr. Factor shall further cause the sums of money provided to be paid under Clauses 2 (a), 2 (b), 2 (c), 2 (d) and 2 (e) hereof to be made to the parties therein named within 30 days after the date on which said decree is entered or within 30 days after the date upon which such [fol. 410] decree may have been waived by Mr. Factor under Clause 9 (d) hereof.

11. If the conditions set forth in Clauses 9 (a) or 9 (b) supra, shall not be fulfilled within the time specified or if without the fault of Mr. Factor or Rella Cohen Factor the District Court shall refuse to enter said Decree as provided in Clause 9 (d) unless said entry of a Decree shall have been waived by Mr. Factor as herein provided then and in any of said events this Agreement shall forthwith become null and void in all respects (except that the Liquidator will forthwith return the deposit of 100,000 dollars to the First Union Trust and Savings Bank to be held by it under the two trusts herein referred to deducting from such payment any costs of conversion and remittance) and thereupon the parties shall revert to the position in which they were immediately prior to the signing of this Agreement, and thereupon in any of said events the Plaintiffs and Intervenors may immediately or as soon thereafter as they may be able to arrange for such resumption resume the taking of the Depositions in London, in which event the Plaintiffs will attempt to re-call the witness C. Levin for further cross-examination and will attempt to produce the witness West for further examination and cross-examination the Defendants in either case here expressly agreeing however that if the Plaintiffs are not able to produce either of such witnesses then in such event the testimony heretofore given shall not be stricken out on the ground that the Defendants have not had the opportunity of cross-examining such witnesses. It is further agreed that if depositions shall be so resumed the time for the conclusion of the taking of such Depositions on the part of the Plaintiffs shall be extended for 30 days after the resumption of the taking of such Depositions shall have commenced and the time of

the Defendants for the conclusion of the taking of their [fol. 411] Depositions shall be extended for six weeks from the date upon which the Plaintiffs shall finish the taking of their Depositions if being agreed that an Order shall be entered in the United States District Court providing for such 30 days additional time for the Plaintiffs and six weeks for the Defendants as hereinbefore stipulated and provided that either party may hereafter ask the Court for further time to complete such depositions of Plaintiffs and Intervenors or Defendants respectively the opposite party reserving the right however to object thereto provided however that nothing contained in this Agreement shall be construed as a waiver or recognition on the part of any of the Defendants in this cause that the Plaintiffs or Intervenors have any right whatever to take any Depositions under the present outstanding commission or otherwise.

12. Mr. Factor expressly renounces any claim he may have to participate in any way in the assets of Broad Street Press Limited or the Vulcan Company or Rhodesia Company (except as mentioned in Clause 4 hereof) either as a creditor or claimant or in respect of any shares held by him or his nominees in Broad Street Press Limited or the Vulcan Company or Rhodesia Company.

13. The parties to this Agreement mutually agree to use their best endeavors and to take all steps and to do all acts and things in their power to comply with the conditions set out in Clause 9 hereof and to make this Agreement final and fully operative and thereafter to carry into effect the terms of this Agreement and particularly Mr. Factor agrees to execute and procure the execution of any documents necessary to enable the two Banks as trustees to make good delivery out of the cash and notes held by them in account of the said two trusts of the cash and notes to be paid and delivered by Mr. Proctor under Clauses 1 and 2 hereof.

14. This Agreement has no reference to the pending [fol. 412] extradition proceedings involving Mr. Factor and Mr. Geen and is without prejudice thereto and on the other hand involves no admission by any person named herein of any liability whether civil or criminal or otherwise how-

soever except a liability to perform this Agreement according to its terms.

As witness the hands of the parties.

Signed by the said G. D. Pepys, Senior Official Receiver. John Factor, by George Gale Gilbert, Jnr., His Attorney and Duly Authorized Agent. Ralph Wordsworth, John H. S. Lee.

(Over 6d. stamp.)

[fol. 413] [Endorsed:] Dated —— —, 1932. The Liquidator of Broad Street Press Limited (in Liquidation) and Others and Mr. Jacob Factor and Others. Draft Agreement. Stafford Clark & Co., 1 Bush Lane, London E. C. 4.

[fol. 414] EXHIBIT A

Broad Street Press, Limited, Vulcan Copper Mines, Limited, and Rhodesia Border Mining Corporation, Limited, all i compulsory liquidation, and George Digby Pepys, the Senior Official Receiver in Companies Liquidation as the Liquidator of each of the said Companies for and in consideration of the sum of $— in hand paid and the receipt of notes secured by first mortgage trust deeds of the face value (including accrued interest) of $— (the receipt whereof is hereby acknowledged) hereby relinquish release and for ever discharge John Factor (sometimes called Jacob Factor) of Chicago, Illinois, Rella Cohen Factor of Chicago, Illinois, Arthur Jack Klein of London, England and Harry Geen (sometimes called Harry Green) of London, England from every claim, demand, contract, promise, right of action, and liability of every kind and character which the said three Companies or any of them or the Liquidator may have or can assert against the above named persons or any of them, and the said three Companies and each of them and the Liquidator hereby further waive and release all claim and right in and to all property of whatsoever kind character or nature now held by or in the actual custody or possession of the said persons hereinbefore named and the First Union Trust & Savings Bank of Chicago Illinois (as Trustee or otherwise) and Foreman-State Trust & Savings Bank of Chicago, Illinois (as Trustee or otherwise) to which the said three Companies or any of them or the Liquidator is or may claim to be entitled or

to which they or any of them could hereafter assert any right in any manner whatsoever.

[fol. 415] Mr. Kearns: May a photostat be substituted in lieu of the original?

The Court: Yes.

Mr. Kearns: There is one other matter to which I would like to call the Court's attention.

We have asked for the production of the certified copy of the order of the courts of Great Britain appointing Mr. Pepys receiver. We have that available a certified copy which was introduced approving the entry into this settlement agreement by that receiver which recites that he is receiver. The certified copy of the order of appointment is on its way.

Mr. Gilbert and the other parties, I understand, do not wish to await the actual arrival of the certified copy of appointment before the entry of a decree.

I would like your Honor to have that in mind, and if your Honor is satisfied to answer the decree on the order that has been produced it seems to me it is probably sufficient, but I wanted to point out that the actual order of appointment has not yet arrived and is not yet available.

Mr. Gilbert: If it will help your record any I will swear that he is the official receiver and was recognized by the [fol. 416] High Court of Justice in my presence. If that will help your record any, I am willing to swear that.

Mr. Kearns: I am satisfied with the entry of the decree prior to the presentation of the order on the understanding it will be produced later, but I did want your Honor to understand that it was not actually here.

The Court: Do you intend to pay the money over before the order gets here?

Mr. Kearns: Well, if your Honor decrees us to.

The Court: Do the parties here all agree that Mr. Pepys is the official liquidator, or receiver, or whatever you call it, duly appointed?

Mr. Gilbert: And qualified and acting.

The Court: And qualified and acting; Mr. Gilbert says he was so recognized.

Mr. Gilbert: By the High Court of Justice.

The Court: By the English courts in his presence, and that comes as near to proving it as it is possible to get it,

unless you have a duly exemplified copy of the order appointing him.

Mr. Lee: No question about it.

The Court: Very well, we will proceed on the theory that [fol. 416½] he is such officer.

Mr. Fischel: If the Court please, may I ask the record to show that the Guardian Ad Litem for Jerome Factor and Alvin J. Factor, minors, and the Trustee for persons not yet in being, was appointed under an order of this court, and the issues raised by the counter-claim, and was present throughout the entire hearing on this issue.

The Court: Yes.

Mr. Kearns: That is all we have to offer at this time. May I apologize to the Court for the length of time we have taken?

Mr. Lee: If the Court please, and Mr. Carter, after I left the stand I asked Mr. McConnell whether he remembered Mr. Carter's making the statement that he thought 10 per cent was a fair percentage, and he said he did. That was not in the first conference to which I have testified, there was a second conference after Mr. Factor had disagreed, and it was at that conference Mr. McConnell says that statement was made by Mr. Carter, and I wanted to—I am sure that must have been true, then.

I wanted to correct, I wanted to have my statement corrected with respect to that. Mr. Carter agrees with me [fol. 417] that there was no such statement made; he has talked with Mr. Gilbert, his associate, and agrees that there was no such a statement made at the first talk when we were all thinking—to which I testified. I am sure I testified to the second conversation—I want it shown that Mr. McConnell does remember that fact because there is no reason for having any question about it if that was the fact.

[fol. 418] THOMAS C. McCONNELL, called as a witness herein, having been first duly sworn, was examined in chief by Mr. Healy, and testified as follows:

Q. State your full name?
A. Thomas C. McConnell.
Q. Where do you reside?
A. Evanston, Illinois.

Q. You are a lawyer by profession?

A. Yes, sir.

Q. Associated with Mr. John H. S. Lee?

A. Yes, sir.

Q. When were you admitted to the Illinois Bar?

A. In 1924.

Q. Have you practiced law in some other city or place prior to that time?

A. Yes, in Boston, Massachusetts.

Q. What generally was your education, your scholastic and legal education?

A. I graduated from Harvard College and after that from Harvard Law School.

Q. You took the full 3-year course at the Harvard Law School?

A. Full 3-year course, yes.

Q. Since you came to Chicago in 1924 you have been practicing your profession continuously?

A. Yes, sir.

[fol. 419] Q. How long have you been associated with Mr. Lee?

A. I have been associated with Mr. Lee since March, 1927?

Q. And you are the Thomas C. McConnell who has been referred to as one of Mr. Lee's associate counsel in this year, which is now on hearing?

A. Yes, sir.

Q. And you prepared Lee Exhibit D which contains a statement or purports to contain a statement of the services which you rendered in this case in association with Mr. Lee?

A. Yes, sir.

Q. Does that Lee Exhibit D truly, correctly and accurately express in more or less detail the services, the legal services which you rendered in this matter?

A. Yes, sir.

Q. When did you first become active in this case, when did you first render any services?

A. My first services were the assistance in the preparation of the bill of complaint.

Q. In May, 1931?

A. Yes, sir.

Q. And have you been continuously engaged in the matter since that time?

[fol. 420] A. Yes, sir.

Q. The statement which has already been offered in evidence and marked Lee Exhibit D indicates that from the time of filing the original bill of complaint in this case in May, 1931, down to July 27, 1932, you gave to this matter 244 days of your time, is that correct?

A. Yes, that is correct.

Q. And that does not take into consideration any time which you may have expended in the matter since your arrival in this country, since July, 1932?

A. No, sir.

Q. You were in London, England, and other places with Mr. Lee during the time when the depositions of various witnesses were being taken?

A. Yes, sir, I was.

Q. When did you leave Chicago to attend that hearing?

A. I left Chicago May 25 and spent, I think, 2 days in New York in reference to checking various facts and arranging for depositions which were to be taken after the European depositions were taken, and left New York June 1.

Q. Were you continuously engaged in the matter after [fol. 421] you left Chicago, as you say, until you returned to Chicago?

A. Yes, sir, I was.

Q. When did you get back to Chicago?

A. I got back to Chicago, I think, the 7th or 8th of August.

Q. 1932?

A. 1932.

Q. Was that August or September?

A. August.

Q. Now, did you ever have to do, in your association with Mr. Lee in this matter, anything in connection with tracing the monies from the Broad Street Press to the Chicago banks?

A. Yes, sir; I did both in investigation of facts and in research as to the correct legal principles, and I did a lot of research work in connection with evidence, as to the technical rules of evidence.

Q. State generally what you did with reference to tracing the funds which are in dispute?

A. Well, it involved conferences with bank officials in New York City; it involved some work in Paris, France, along the same line. It involved conferences with witnesses in London, England, bank accountants, bank clerks and bank officials. It involved the examination of a large [fol. 422] amount of documentary evidence. I think I am safe in saying over 100 different documents were involved. It involved examination of books and records, it involved the analysis of those records as to the technical proof involved in laying the foundation for that documentary evidence, and I think in most instances, it involved the examination on the stand of the witnesses and the production of the documents and records in court.

Q. Did you have to identify documents and bonds by numbers, or anything of that sort?

A. Part of the proof involved the tracing of funds out of the accounts of the Broad Street Press into an account known as the account of H. Wise with the North of Scotland Bank and out of that account into the purchase of certain war loan bonds by a broker in the City of London.

The technical proof required the identification of the bonds by number, which involved locating the witnesses who had actually handled the transactions, and it involved placing from those bond numbers and disposition of the bonds, their sale,—the sale was not here but in New York City,— [fol. 423] that tracing, tracing the proceeds of the sale back to Chicago through various accounts into the final lodging of the funds with the two defendant banks.

Q. Did you conceive it to be necessary in order to sustain the allegations of the second amended bill of complaint filed in this cause to identify and show that the money which originated in the Broad Street Press was the same money; or the proceeds of that money which finally lodged in the Chicago banks?

A. We considered, under the opinion of his Honor, Judge Wilkerson, that that was absolutely essential to make out our case.

Q. And your efforts were to trace the money from the Broad Street Press to the particular banks in Chicago, which the bill alleged were the custodian of the funds?

A. That is so.

Q. And after you had concluded your effort in that respect, are you of the opinion that you had succeeded in establishing the necessary proof to sustain the allegations of the bill in that regard?

A. I believe so, with possibly two or three exceptions, where objections were made to technical proof of tables, which we were ready to supply and could have supplied the actual technical proof, but which we were interrupted in doing by the settlement.

[fol. 424] Q. But you believed you had submitted, or were in a position to submit, all of the proof to sustain the allegations of the bill in that respect?

A. That is right.

Q. Of course, counsel on the other side disagreed with you?

A. Absolutely, very vigorously.

Q. Now, I want to call your attention to a conversation that occurred in Mr. Pepys' office, or just outside of Mr. Pepys' office, in London, with reference to a statement made by Mr. Lee in your presence, and in the presence of some other gentlemen, concerning the right of Mr. Factor to decide or determine or to object in any way to the fee which was to be allowed to Mr. Lee, do you remember the occasion to which I refer?

A. Yes, sir.

Q. Who was present at that time?

A. Mr. Gilbert, Mr Carter, a British lawyer, an English lawyer, by the name of Harry Myers, and Mr. Lee and myself.

Q. Where did that conversation take place?

A. It took place on the curbing in front of the Board of Trade, 33 Carrie Street, London, England.

Q. Was that the continuation of a prior conversation [fol. 425] which had occurred in Mr. Pepys' office?

A. It was.

Q. Just state the substance of the two conversations.

Mr. Langworthy: I object to that, your Honor, please. It is evidently the intention to get in an admission on the part of Mr. Pepys which I do not believe is material.

Mr. Healy: Mr. Pepys is an objecting party here and we have a right to introduce in evidence about the conversation —there is no jury here.

The Court: I will take it subject to the objection.

The Witness: A In substance, the conversation in Mr. Pepys' office was to the effect——

Mr. Langworthy: I think the question called for the conversation.

Mr. Healy: I asked him to recite the two conversations.

Q. Were the same parties present at the first conversation?

A. No, Mr. Pepys was not present at the second conversation.

Q. At the first conversation he was present; just state who was present at the first conversation, the same parties?

A. The first conversation, in addition to the parties I [fol. 426] have already named, George Digby Pepys, Senior Official Receiver, and Mr. Newman, his assistant, and Mr. Clark his solicitor.

Q. Tell us the substance of that first conversation?

A. The substance of the first conversation was that Mr. Factor or Mr. Factor's counsel advised Mr. Pepys that Mr. Factor wished to object to the amount of the attorney's fees unless we could reach an agreement on an amount, I think approximately 10 per cent. I am not sure about the exact figure, I am not sure the exact figure was reached or mentioned.

And Mr. Lee took the position that he could never, in this controversy, place himself in a position where a defendant in the lawsuit should have anything to say as to the amount of his fee.

He stated that such a position would subject him to criticism, and would leave to inference that a settlement had been arranged on an understanding that he should share in a fee, and that he had entered into the settlement agreement.

He took the position that his arrangement was, that his fee was to be fixed by the court, and he would stand on that. And, as I understand, that met the question at the time, [fol. 427] and I think that matter was resubmitted to Mr. Factor.

Anyway, after the conference was over it was taken up, that question was taken up again in a discussion on the curb outside——

Mr. Langworthy (interposing): What was said outside, unless Mr. Pepys was present, I object to.

The Witness (continuing): —and Mr. Harry Myers stated that he did not see how Mr. Lee could take any different position than that, simply as a matter of professional ethics.

That was the substance and extent of the conversation.

Q. You have been in court since this hearing began before His Honor, Judge Wilkerson?

A. Yes, sir.

Q. And you have heard Mr. Lee testify here with reference to the services which he rendered.

A. I have.

Q. And which were rendered by you?

A. Yes.

Q. And, generally speaking, does his recollection of what occurred in this case and his statement of what he knew you did accord with your recollection of the matter?

[fol. 428] A. Absolutely.

Q. At the time the settlement was made, what was the rate of exchange between America and Great Britain?

A. As I recall it, at one of the conferences it was the basis of the negotiations—was figured on the basis of $3.60. I don't know have any actual figure in mind, but I am sure that was the rate of exchange at that time.

Q. What is the rate of exchange now?

A. I understand it is $3.46.

Q. And if the settlement had been made on the basis of the British pound as against the American dollar this change in the rate of exchange would have made a difference to your clients of how much, approximately?

A. It is a matter of computation, but roughly it was around $51,000.

Mr. Langworthy: I object to that, if your Honor please. The rate of exchange could not have any bearing here.

Mr. Healy: But simply to show these gentlemen, if your Honor please, as Mr. Lee testified, insisted that the settlement should be on the basis of the American dollar and not the British pound. As a result of that, due to the rate of exchange, due to the fact that the rate of exchange has fallen his clients have profited to this additional extent. It [fol. 429] shows that he was alert and on the job.

Mr. Langworthy: That would only be true, if it was true, or if it is true, that the pound will purchase as much now

as it would then. Usually when there is a difference in the value of money there is a difference in the value of goods. We are getting into economics that lawyers like to indulge in for their own amusement, just to know a little about it.

The Court: The Court will take judicial notice of the rate of exchange, anyway.

Mr. Gilbert: What would have happened if it went up?

Mr. Healy: Yes, but we believed that the pound was going down. We had more confidence in the American Dollar.

Mr. Gilbert: It proves that you were a good guesser on the pound.

Mr. Healy: You may cross-examine.

The Court: Any cross-examination?

Mr. Gilbert: I would like to ask just a few questions.

Cross-examination.

By Mr. Gilbert:

Q. Mr. McConnell, I don't want to, I am not asking these questions for the purpose of distracting from the time you spent in working in New York or Paris but the work done [fol. 430] in Paris was not ever used, was it?

A. Well, it was not used in the sense that——

Q. You spent time, but you never got far enough along in your case to ever call for any witnesses in Paris?

A. No, but if we had gone ahead it would have been available.

Q. Now, in New York you conferred with Mr. Lockwood?

A. Yes.

Q. When was the first time you conferred with Mr. Lockwood?

A. I think in July, 1931—no, yes, latter part of July, 1931.

Q. Who put you in touch with Mr. Lockwood?

A. I don't know that I recall who put me in touch with him. I knew that he had represented the British government in New York.

Q. Didn't Mr. Overmyer put you in touch with him?

A. He may have, I don't recall exactly.

Q. The first time you heard of Lockwood was from Overmyer, wasn't it?

A. No, the first time I ever heard of Lockwood was in the hearings before Judge Walker.

[fol. 431] Q. In the extradition case?

A. Yes, sir.

Q. The fact of the matter is, Lockwood is another attorney for his Britannic Majesty's consul and this one happened to be in New York.

A. He was not at the time I saw him; he was at one time, yes.

Q. He was not at the time you saw him?

A. Well, now, he may be on a permanent retainer. I don't know.

Q. That is what I mean.

A. He may be.

Q. His firm is the general representative of the British Government in New York?

A. I think that is right.

Q. And Mr. Lockwood carried on the extradition proceedings against Arthur J. Klein in New York?

A. That is true.

Q. Whatever you learned in New York, at least, was not followed up by any proof by anyone located in New York?

A. It was the basis, it would have been followed up by the depositions to be taken in New York.

Q. You spent some time conferring and finding out what Mr. Lockwood, any information that he might have that [fol. 432] he had gained through his representation of the British Government in the Klein case, that is what it amounts to, isn't it?

A. Approximately.

Q. Mr. Lee yesterday testified shortly before you went to Europe on this very pleasant trip that we both had—I had a lot of fun with Mr. McConnell—that you made some arrangement with Mr. Overmyer about some compensation you were going to get. Will you please tell us what that was and how it came about?

A. Well, the only arrangement I made was with Mr. Lee. I had an arrangement with Mr. Lee whereby a part of my time was reserved for my own work, and I went to Mr. Lee and I told him I could not spend all of my time in this litigation, that I had other business, that I was losing money and I think I put a specific case to him where I had been asked to be retained, and he said that he would make an

adjustment satisfactory to compensate me for my time. He made the arrangement, whatever arrangement was made.

Q. What was the arrangement?

A. That I was to receive out of the share of Mr. Overmyer, approximately, I think 7.7, or approximately 8 per cent—7.7 per cent.

[fol. 433] Q. And you had no dealings direct with Mr. Overmyer?

A. No.

Q. That arrangement was made by Mr. Lee?

A. Yes, sir.

Q. At that time you knew Mr. Overmyer was the representative of the British consul in an application for an extradition of John Factor, didn't you?

A. Yes, sir.

Q. You had known since, that since that time, you had known that since the filing of your bill in this case on May 20, 1932?

A. Yes, sir.

Q. Just exactly what time did Mr. Lee tell you he had arranged with Mr. Overmyer so you were to get 7.7 per cent of Mr. Overmyer's fee under the contract of January 6?

A. On my return from Europe.

Q. Now, on your return from Europe, not before you went?

A. No.

Q. When was it, how long after you returned?

A. I think he told me within a day or so after I had gotten back.

Q. Mr. Lee, preceded you back to America, didn't he?

A. Yes, he did.

[fol. 434] Q. And Mr. Carter came back with him and you and I stayed there?

A. Yes.

Q. Shortly after you arrived you were informed of this. Did Mr. Lee tell you when he made that arrangement with Mr. Overmyer?

A. No, he did not.

Q. But you had not heard of it until you got back?

A. No.

Q. You prepared the original bill in this case, didn't you?

A. Do you mean, did I physically prepare it?

Q. You dictated it to a stenographer to type, it was your dictation, wasn't it?

A. I think Mr. Lee and I worked on it together. I don't recall I did it alone. I am sure I did not, because the work that is done in the office, Mr. Lee and I worked together.

Q. You got your information about what went into the bill from Mr. Lee?

A. Yes, sir.

Q. Then you had numerous conferences from time to time with Mr. Overmyer, didn't you, beginning shortly after the filing of the original bill?

[fol. 435] A. I did, yes.

Q. You knew at all times what his position in the extradition case was?

A. I knew that he was representing the British consul.

Q. You knew the progress of the case from time to time?

A. I did; I wanted to know what the facts were.

Q. And he knew the progress of the civil case, at all times practically as you know?

A. Well, there was no progress in that civil case after the filing of the bill until along in July.

Q. What is that?

A. I say there was nothing done in the civil case in the way of a court proceeding until——

Q. I mean, throughout, from the time it started until this settlement agreement was entered into, Mr. Overmyer, except while we were in England, and you at all times by inquiry from you or Mr. Lee or by attending court, the position and the status of the civil case?

A. I think he either knew or he should know; that is, he had sufficient information to know what was going on.

Q. You attended many sessions of the extradition case [fol. 436] personally, before Commissioner Walker?

A. I think for a while, that is, until I got a pretty good idea of what the facts were from the reading of the depositions. Then I did not attend after that.

Q. Mr. Overmyer furnished Mr. Lee all of the documents which were used before the Commissioner, before Commissioner Walker, did he not?

A. Yes, that is true.

Q. And from those documents was prepared the second amended bill of complaint in this case?

A. Not entirely, we had some affidavits and other information.

Q. Well, that was the bulk of the information?

A. Yes, but I want to say this, as you know, that that extradition record is just the documents—there is no order or arrangement to them, and it was a terrific task to take those documents and analyze them and get any sort of sequence of order out of them; they were taken in a sort of informal hearing.

Q. Yes, it was difficult.

Q. There was no theory in the extradition case analogous or similar to the theory we were advancing in this case; we had to do all that ourselves.

[fol. 437] Q. You mean, prior to your making the analysis?

A. That is right.

Q. You made the analysis prior to your filing the second bill of complaint which was early in July, 1931?

A. That is correct.

Q. And after you made that analysis you gave Mr. Overmyer the benefit of it?

A. Well, he saw the second amended bill of complaint.

Q. Didn't you discuss it, now, in his presence that this happened this way and that happened that way and the other way, that is the way we think it happened, that is the way we are going to try our lawsuit, on that theory?

A. That might be true, yes; I don't recall any particular conversation. If the inference is that I assisted him in his criminal case, I want to——

Mr. Healy: Don't let your voice die away. I want to hear what you say.

A. I say, if the inference is I assisted him in the criminal case I want to reply to that inference because I did not, I had no interest in it.

Q. You furnished him with copies of all the work you did that he requested, didn't you?

[fol. 438] A. Yes, but that was a matter of——

Q. You are now speaking of your purpose and I am speaking of the facts.

A. I just—you leave an inference there I was working with him in his criminal case and I don't want that inference in this case, in this record, because I did not.

Q. You mean to say that whatever you said to him and gave him was, the purpose was not in your mind to be used in the criminal case, I take it that is what you mean?

A. Yes, I mean that I was not assisting him in his criminal case.

Q. But it was available for use by him, wasn't it?

A. (No response.)

Q. I am requested to ask you this, and then I am through —no, I am not through. How long have you known Franklin R. Overmyer?

A. I never saw Mr. Franklin Overmyer or heard of him except through the newspapers prior to, oh, I will say a week after the bill was filed in this case.

Q. You never saw him?

A. No.

Q. And never heard of him?

A. No, never heard of him except I had seen his picture in the papers.

Q. Did you see the public prosecutor when you were in [fol. 439] Great Britain?

A. Yes, sir; I did.

Q. Did he assist you in getting witnesses to testify before United States Consul Roy in the taking of depositions under the Commission in the civil case?

A. No.

Q. He did not assist you in any way?

A. I went to him once, together with Mr. Perry to try and locate one witness who they had under surveillance, or had him on record.

Mr. Healy: A little louder, please.

A. (Continuing:) And he sent me to Scotland Yard and Scotland Yard refused to give me any information. That was the end of it.

Mr. Gilbert:

Q. Is that the only time you ever saw the public prosecutor?

A. No, I think I saw him another time with reference to some exhibits.

Q. Were you present at the interview between the public prosecutor and Mr. Lee, *at* which Mr. Lee testified yesterday?

A. No, that was, I think, before I arrived in London. I had gone to Paris prior to that time.

Q. The exhibits you were seeking you secured from him? [fol. 440] A. Yes, I did. They were the records of the Broad Street Press and were the property of the official liquidator which he had loaned to—no, he had not loaned them, they had taken them under subpœna. They were their records, official records.

Q. They were in their possession, under their exclusive control, and he let you have them?

A. That is correct.

Q. Mr. McConnell, the first time you ever told any of the lawyers or parties on this side of the case that Mr. Overmyer had an interest in the civil matter was the day following the execution of the settlement contract in London, England, on Harley Street in a conversation between you and I, is that right; did you ever tell anyone before that?

A. No, I don't think I ever talked to anybody about it.

Q. But you tell me then, at least, that he had an interest in this fee?

A. Yes, sir; I did.

Q. And didn't you also say that he had employed you?

A. I don't know that I used that technical word. I meant we had been introduced to the business—he was [fol. 441] getting a forwarding fee. I think I told you he was getting a forwarding fee.

Q. But he did introduce you to the business, didn't he?

A. Technically, he didn't, but I always felt that in a moral sense, he did—there was a moral obligation there.

Mr. Gilbert: I think that is all.

Redirect examination.

By Mr. Healy:

Q. Mr. McConnell, in any conversation you had with Mr. Gilbert, you did not mean to indicate to him that Mr. Overmyer had introduced you or Mr. Lee to this litigation in the first instance?

A. In the first instance?

Q. Before the filing of the bill?

A. No, not at all.

Q. That was only with reference to the parties who subsequently intervened in the case?

A. That is right, and I felt free to discuss it because of the affidavit that was filed by Mr. Wordsworth, which is here, which had stated practically these facts; the affidavit is here. It was not a matter of—it was clear between us, I think, from the affidavit.

[fol. 442] Mr. Gilbert:

Q. Then, what you mean to say now is, Mr. Overmyer introduced you in the first instance to Mr. Faber who employed you for all the balance, you considered it as such?

A. I have answered that, I think.

Mr. Healy: Anything more?

Mr. Langworthy: No.

Mr. Healy: If your Honor please, Mr. Langworthy introduced a letter the other day which emanated from Mr. Wordsworth's office, and in connection with that letter I think there was an understanding on the other side if that letter was offered in evidence the affidavit of Mr. Wordsworth should go in with it.

Mr. Gilbert: There was such an understanding.

Mr. Healy: So, I offer in evidence, if your Honor please, the affidavit of Ralph Wordsworth, taken before a notary public, and with some sort of a certificate of authentication attached, and ask to have it marked Lee Exhibit F.

Mr. Gilbert: No objection.

(And thereupon said document so offered and received was marked Lee Exhibit F, and is in words and figures as follows, to-wit:)

LEE EXHIBIT "F"

[fol. 443] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS (EASTERN DIVISION)

ARTHUR TRAVISS FABER and ADAH HAYHURST, Plaintiffs,

vs.

FOREMAN-STATE TRUST AND SAVINGS BANK, a Corporation, Foreman-State Corporation, a Corporation, First Union Trust and Savings Bank, a Corporation, Union Bank of Chicago, a Corporation, The Central Trust Company of Illinois, a Corporation, J. Factor, Louise Cohen, Rella Factor, nee Cohen, and Arthur L. Schwartz, Defendants

I, Ralph Wordsworth, of 39 Lombard Street, in the City of London, England, Solicitor, make oath and say as follows:

1. I am the Senior member of the firm of Wordsworth, Marr Johnson & Shaw Solicitors who carry on business at 39 Lombard Street in the City of London aforesaid. I was admitted to be a Solicitor of the Supreme Court of England in August 1900 and I have continued to practice as such Solicitor in the City of London from that date until the present time.

2. In October 1930 I was consulted by Miss Edith Oerum who had been induced by the Broad Street Press Limited (hereinafter called "the Company") to purchase 12,000 shares in the Vulcan Copper Mines Limited. On the 27th October 1930 my firm filed a Petition in the High Court of Justice on behalf of the said Edith Oerum to wind up the Company, and on the 10th November 1930 the Court made an Order winding up the Company compulsorily. On the 24th November 1930 the Court made Orders winding up compulsorily the Vulcan Copper Mines Limited (hereinafter called the "Vulcan Company") and the Rhodesia Border Mining Corporation Limited (hereinafter called the "Rhodesia Company"). Mr. George Digby Pepys, the Senior Official Receiver, became and still is the Liquidator of the Company, the Vulcan Company and the Rhodesia Company.

[fol. 44] 3. The duty of the Senior Official Receiver as Liquidator of the Company has been to make an investigation into its affairs to get in its moneys and other assets and after realization thereof to distribute the same among its creditors. Since the Order of the Court winding up the Company my firm have acted and are still acting for the Senior Official Receiver in his capacity as Liquidator of the Company in connection with various matters relating to its affairs.

4. In June 1931 the Senior Official Receiver became aware of these proceedings having been started in the District Court of the United States for the Northern District of Illinois and consulted with me as to what (if any) steps he should take either by intervention in the said proceedings or otherwise with a view to recovering from Jacob

Factor the sum of £604,880 in respect of which the said Jacob Factor appeared as a debtor in the books of the Company. In accordance with instructions received from the Senior Official Receiver I got in touch with Mr. Franklin R. Overmyer an Attorney at law with offices in the First National Bank Building, Chicago, asking for his advice as to whether and what action should be instituted by the Senior Official Receiver to collect the said debt and whether it would be advisable for the Senior Official Receiver to intervene in the said proceedings then pending.

5. Towards the end of July 1931 Mr. John H. S. Lee, (hereinafter called "Mr. Lee") the Attorney for the Plaintiffs in the said proceedings called upon me with a letter of introduction from the said Franklin R. Overmyer in which the latter stated that the visit of Mr. Lee to England would afford Mr. Overmyer a better means of communication with me than could be effected by correspondence [fol. 445] and he added that Mr. Lee was a member of a very reputable and well known law firm and that Mr. Lee understood that both he and Mr. Overmyer were free to adopt such course of procedure as might seem best, adding that he, Mr. Overmyer, had not yet filed an Intervening Petition on behalf of the Senior Official Receiver in the said proceedings.

6. Mr. Lee handed me a print of the Amended Bill filed in these proceedings. I perused the said Amended Bill, informed the Senior Official Receiver of the presence of Mr. Lee in London, and on the invitation of the Senior Official Receiver arranged for an interview between them. Accordingly I called on the Senior Official Receiver at 33 Carey Street, London with Mr. Lee when the position with regard to these proceedings was very fully gone into. The Senior Official Receiver asked the said Mr. Lee various questions about the said proceedings and in particular, with regard to the right of the Senior Official Receiver as Liquidator of the Company to intervene therein, and also especially with regard to the costs which the Senior Official Receiver as Liquidator of the Company might be called upon to bear in the event of the said proceedings being unsuccessful. Mr. Lee answered the Official Receiver's questions at considerable length, and with regard to the question of costs, he pointed out that as he was informed, the position of

costs in America was different from the position of costs in England, and that the only costs which would be chargeable against the Liquidator of the Company if he instituted a suit in America or intervened in the said proceedings and such proceedings failed would be of a more or less nominal amount. The Senior Official Receiver stated that he would consider the matter, and at a subsequent interview which took place at his office he informed me and Mr. Lee that after careful consideration he had decided that he would not intervene in the said proceedings at any rate at that juncture, but that he thought the right course would be [fol. 446] for the shareholders in the Vulcan and Rhodesia Companies or as many of them as would agree to do so to intervene in the said proceedings in their individual capacities. The Senior Official Receiver went on to say that he had no objection to my firm sending out a circular to the said shareholders explaining the position and inviting them to intervene therein. I asked Mr. Lee whether he would consent to represent such persons stating that many of them were very poor, and he replied that, in view of such fact he would be glad to represent whoever of the said shareholders wished to intervene and would consent to do so without making them any charge unless he was successful in the said proceedings, provided, however, that they were willing and able to pay in advance all costs and other out of pocket expenses in connection therewith. I said that I would be willing to communicate with the shareholders of the Vulcan and Rhodesia Companies on the lines indicated above. I had no doubt whatever that I should be acting with perfect propriety in so doing. I then thought and still think that it was a matter of the greatest importance to the shareholders of those Companies that they should have an opportunity of intervening in or supporting the said proceedings thus sharing in any fund which might be recovered as a result thereof. I considered and still consider that it was right and proper for me to communicate with the shareholders of those Companies so that they might have such opportunity, and I was gratified that I could be of assistance to this end.

7. The Senior Official Receiver lent my firm a complete list of all the shareholders in the Vulcan and Rhodesia Companies together with their addresses. Thereupon I

prepared a draft circular letter to be sent to the shareholders of the Vulcan and Rhodesia Companies, and produced the draft to the Senior Official Receiver who made suggestions for slight modifications which modifications were adopted. Inasmuch as I was anxious that the shareholders receiving the proposed circular letter should not [fol. 447] be influenced by the belief that it was being sent out on the instructions of the Senior Official Receiver, I inserted a paragraph pointing out that whilst my firm were representing the Official Receiver in his capacity as Liquidator of the Company, we were not acting for him in relation to the subject matter of our communication. The circular letter was sent out to all the shareholders of the Vulcan and Rhodesia Companies on the 26th August 1931 together with a form of authority to Mr. Lee to include any shareholder signing the same as party plaintiff or as intervenor or otherwise supporting the said proceedings and a form to be filled up giving short particulars of the holdings of the shareholders in the Vulcan and Rhodesia Companies and of other dealings which they had had with the Company. Prints of the said circular letter and of the said documents which accompanied are annexed hereto marked "R. W. 1" "R. W. 2" and "R. W. 3" respectively.* The response to the said circular letter was very considerable. About 870 persons replied authorising Mr. Lee to include them as intervening petitioners or otherwise supporting the said proceedings and those who could afford to do so sent their contributions towards the out of pocket costs charges and expenses thereof. In a number of cases such persons were represented by their own solicitors who after full enquiry advised their clients to come in and support the said proceedings and who have since been in communication with me from time to time as to the progress of the matter and have rendered me such assistance as they were able.

8. When the said circular letter was despatched as aforesaid Mr. Lee was on tour with his family in Europe. On his return to London I showed him a print of the circular

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* Documents not included in certificate at this point as already set out at following pages, respectively—R. W. 1—p. 150, R. W. 3—p. 151, R. W. 2—132.

letter and the accompanying documents, and I also showed him the replies which had been received.

9. At no time did Mr. Lee either directly or indirectly solicit the Senior Official Receiver or so far as I know any [fol. 448] other person to intervene in the said proceedings or to take any action therein. All that he did was to agree at my request and with the knowledge of the Senior Official Receiver to act on the terms above referred to for any persons who wished to intervene in the said proceedings which had already been started for the benefit of themselves and all other persons similarly situated.

Sworn at 39 Lombard Street in the City of London, this — day of July, 1932. Before me, —— ——, a Commissioner for Oaths.

[fol. 449] [Endorsed:] In the District Court of the United States for the Northern District of Illinois, (Eastern Division). Faber et al. vs. Foreman-State Trust and Savings Bank et al. Affidavit of Ralph Wordsworth, Esq. Wordsworth, Marr, Johnson & Shaw, 39 Lombard Street, London, E. C. 3.

[fol. 450] Mr. Healy: There is just one other thing. I don't want to use it at this time, but I would like to have in the record the letter of Mr. Levinson that Mr. Lee testified about.

Mr. Gilbert: On request of counsel I produced our office copy of the letter mentioned.

Mr. Healy: That may be marked Lee Exhibit G.

Mr. Gilbert: That may be copied by the reporter and then given back.

(And thereupon said document so offered is received in evidence and is marked Lee Exhibit G. and is in words and figures as follows, to-wit:)

LEE EXHIBIT "G"

[fol. 451]

Copy

Levinson, Becker, Gilbert, Peebles & Swiren, One La Salle St. Bldg., Chicago

January 4, 1932.

Messrs. Petit, Olin & Overmyer, 1041 33 S. Clark Street, Chicago.

GENTLEMEN:

In re John Factor

Pursuant to conference we had today in your office, with Messrs. Petit, Overmyer, Peebles and the writer present, we beg to say:

1. That we understand that you now and for many months have represented the British Official Receiver of both the Vulcan Copper Mining Corporation, Ltd. and the Rhodesia Border Mining Corporation, Ltd. and that the Official Receiver represents the entire group of shareholders in each of these companies. That therefore if any right of action exists on behalf of the shareholders it properly inheres in the Official Receiver. Consequently we assume that you as the regular counsel for the Official Receiver should deal with the civil actions claimed by shareholders.

2. You are counsel for the British government in the extradition proceedings. These are still pending. While the opinion of Commissioner Walker was in your favor, at the close thereof he significantly said:

"It may well be said that whether or no the acts made an offense in said statute come within the purview of the treaty is a question of great nicety and closeness. It may well be regarded as one which ought to have further judicial interpretation by the courts of ultimate review."

3. In October we made, through the British Embassy at Washington, a proposal to adjust without prejudice to the British Crown and without prejudice to the rights of Factor all civil claims of shareholders of the Vulcan and the Rhodesia Mining companies for £242,500 sterling.

About the middle of November the writer went to London and took up the matter of settlement with the senior Official [fol. 452] Receiver, Mr. Pepys, and his assistants, Messrs. Naunton and Newman. We had several interviews. Mr. Pepys made personally and by letter (copies of which are enclosed) the suggestion that the writer put in condensed form the adjustment proposal previously made on behalf of Factor. You have a copy of both the proposal as originally presented to the British Embassy and sent on to London, as well as the condensed offer the writer submitted to Mr. Pepys as senior Official Receiver. Therefore we consider that you, being the counsel for the Official Receiver, are the proper persons with whom we should and are willing to discuss the matter of settlement of these alleged civil claims.

4. As to the extradition which is pending, awaiting an order to be entered by the Commissioner, we submit that especially owing to the closeness and doubtfulness of the case under Illinois law as announced by the Commisssioner himself, and that a violation of the Fraudulent Conveyance Statute is only a misdemeanor punishable by a fine not exceeding $1000 without any jail or other sentence, it is in the cause of justice and fair play that Factor be allowed the opportunity of having these "doubtful and close" legal questions passed upon by the proper courts of review, as suggested by the Commissioner, without being restrained of his liberty during that time. But you are entitled to have abundant assurance of his appearance whenever needed and legally required. To that end we offer, with the consent and signature of John Factor to this letter, to see to it that the trust property now in the possession of the First Union Trust & Savings Bank and the Foreman-State Trust & Savings Bank shall be held intact as security for the appearance of John Factor so long as said extradition proceedings are pending regardless of the outcome of the civil proceedings now pending in the Federal Court at Chicago.

5. In consideration of this agreement you will allow this assurance to operate as your security for the appearance of Mr. Factor at any time his presence is legally required in any court or before the Secretary of State of the United States. With this assurance the British government is to

agree that Factor shall not actually be incarcerated or restrained of his liberty during the pendency of any habeas corpus proceedings or contest before the Secretary of State.

6. We will agree with you upon satisfactory papers containing in substance the foregoing suggestions.

[fol. 453] 7. We are credibly advised that Arthur Klein has been released on reasonable bail by the British authorities in London.

Very truly yours, Levinson, Becker, Glenn & Schwartz, by —— ——.
SOL. K.

P S.—It is our contention that the suits pending in the Federal court are without jurisdiction in law and without merit in equity.

[fol. 454] Mr. Healy: May I have an understanding with counsel if it becomes necessary to refer to any of the briefs filed by Mr. Lee in this matter about which he testified they may be considered before the Court and in the record, if any of the parties desire to have them in the record.

Mr. Gilbert: On behalf of the defendants I represent it may be so stipulated.

Mr. Healy: And you, Mr. Langworthy?

Mr. Langworthy: I cannot see any objection to it.

Mr. Healy: I think that is all, if your Honor please, but I understand now that if it is agreeable to the Court we will adjourn until 2 o'clock and Major Tolman is about to be called by Mr. Langworthy, and we have agreed that the matter will be submitted, so far as the expert proof is concerned, upon the testimony of Mr. Tenney and Major Tolman, is that right?

Mr. Langworthy: Yes.

Mr. Healy: And that will conclude the proof.

Mr. Langworthy: And then we are to make a very brief short statement to the Court about our views on the subject and close this case.

The Court: We have a judges meeting, I think of the District Judges, at 3 o'clock. I am not sure, but I think we have. We will adjourn until 2 o'clock.

[fol. 455] Mr. Langworthy: I have not heard from Major Tolman today, but he is expected in his office at 11 o'clock.

Mr. Gilbert: I understand that he is here.

The Court: Can you finish in an hour?

Mr. Healy: We will take a very short time. I don't know what the Major will testify to, but I think your Honor realizes that I have been trying to expedite the matter.

The Court: I think all parties would like to conclude and have a decision and decree entered and that will be the end of the matter.

The Court: I am under something of a commitment to attend a meeting of the Judges of the District Court at 3 o'clock. Perhaps I can get out of that.

Mr. Gilbert: I think it is important to conclude the matter as soon as possible.

The Court: All right, at 2 o'clock we will come back.

(The further hearing of the above-entitled matter was thereupon adjourned until 2 o'clock, September 23, 1932.)

[fol. 456]

FABER

vs.

FOREMAN

Before Judge Wilkerson

Friday, September 23, 1932—
2:00 o'clock p. m.

Court met pursuant to adjournment.
Counsel present: Same as before.

EDGAR RAWSON TOLMAN, called as a witness on behalf of the respondents, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Langworthy:

Q. Will you state your full name, Major Tolman?
A. Edgar Rawson Tolman.
Q. Where do you reside, Major?

A. I reside in Chicago.

Q. What is your profession?

A. I am a lawyer.

Q. Will you state to the Court where you were educated?

A. I graduated from the old University of Chicago in 1880, from the Union College of Law in 1882, and I was admitted to the bar in March of 1882.

[fol. 457] Q. Will you briefly state for the record, Major Tolman, your experience as a lawyer?

A. With emphasis on the "briefly", I studied law in the office of Doolittle & McKee. I was later admitted to membership in that firm. I continued the practice of that firm after the death of all my seniors, and then continued in the general practice until the year 1898 when I was out of practice for seven months.

Resuming my practice after my return to this country in 1898, I was appointed head of the law department of the Special Assessment Department of the City of Chicago. I reorganized and administered that department until 1903. I was then appointed Corporation Counsel of the City of Chicago, served there until 1906, and since then I have been engaged in general practice, specializing in the law of municipal corporations and municipal securities.

Q. Have you had any experience in the practice of your profession in the United States courts in the City of Chicago?

A. I have. I have tried some cases here.

Q. For the sake of the record, could you state a little more fully your experience in the United States courts in Chicago?

A. Well, my specialty, of course, has led me into the state courts more than the federal courts, but I have had im-

[fol. 458] portant litigation in the federal courts, from the time that I was a member of the firm of Doolittle, McKee & Tolman. There was, of course, litigation in the federal courts when I was Corporation Counsel, which I was in Charge of, and there has been a reasonable amount of experience in the federal courts.

Q. You had charge of the traction litigation for a number of years in the federal court, did you not?

A. I didn't hear your question.

Q. You had charge of the traction litigation in the federal courts?

A. Yes, I did. I lived here for a while.

Q. Yes.

A. In that litigation. That was in the year 1903, I think. I carried that litigation to the Supreme Court of the United States, and argued that case there.

Q. Major, will you state for the record your connection with the Bar Associations, and positions that you have held in that connection?

A. I have been president of the Chicago Bar Association, president of the Law Club of Chicago, president of the Illinois State Bar Association; I am a member of the Executive Committee of the American Bar Association, and editor in chief of the American Bar Association Journal.

[fol. 459] Q. Have you held those positions with the American Bar Association for any considerable time?

A. Yes, I have been a member of the Executive Committee since 1922, ten years.

Q. Did you attend the meeting of the American Bar Association in London?

A. I did, in 1924, I think.

Q. Were you one of the speakers for the American Bar Association at one of the dinners given by the Lawyers of England?

A. I had the pleasure of responding to a toast "Our Guests", at the Inner Temple. I divided the honors there with Mr. Stimpson.

Q. Major Tolman, from your experience, have you found that you have become acquainted with the usual and customary charges of lawyers at the Chicago Bar, and in this court, for services that they rendered their clients?

A. Yes.

Q. Have you examined the bill of complaint in this case and the statements furnished by the plaintiff's attorneys offered in evidence as Lee Exhibits C and D, which I hand you (handing documents to the witness)?

A. Yes, I have read both of these instruments or copies of them.

[fol. 460] Q. And did you examine a copy of the second amended bill of complaint?

A. The papers that I examined have just been brought into the court room. I read a printed copy of an amended bill of complaint, whether it was first or second, I can't remember. The amended bill of complaint.

Q. Yes. This is it. Did you examine the agreement that was entered into in London on July 19, 1932, and that has been offered in evidence as an exhibit in this case between Mr. Pepys, Mr. Lee and Mr. Factor?

A. I read it.

Q. Have you read the evidence of Mr. Lee and Mr. Tenney given in this case?

A. Yes, I read the direct testimony of Mr. Lee. I had not quite finished his cross examination. I read, I think, only the direct testimony of Horace Tenney, although I did run over a little into the cross examination. But I have only arrived here in the city this morning, and I read the parts that seemed to me to be most important. If you think it important for me to read the cross examination, I can do so.

Q. You had these papers yesterday, did you not?

A. Yes, I had these papers yesterday.

Q. And examined them then, too?

A. I did.

Q. Yes.

[fol. 461] A. But I did not have the transcript of that testimony that was taken in court until this morning.

Q. Yes. From your examination of these documents, and the reading of the testimony of Mr. Lee, and the examination of the statements of Mr. Lee and Mr. McConnell, have you been able to form an opinion as to the reasonable value of the services rendered by Mr. Lee in this litigation?

A. I have.

Q. Including the services that he rendered while he was in England on each occasion?

A. Yes.

Q. Have you been able to form an opinion as to the value of the services rendered by Mr. McConnell in the case?

A. Yes, I have.

Mr. Langworthy: I would like to have Mr. Healy, if he would, state a resume of Mr. McConnell's testimony that he gave this morning.

Mr. Healy: Oh, I think counsel had better do that.

Mr. Langworthy:

Q. Mr. McConnell testified this morning that he was educated at Harvard College, graduated, graduated from

Harvard Law School, practiced law for a time in the City of Boston. That he came to Chicago in 1924, became associated with Mr. Lee in 1926, and has been employed in his office since then. That he devoted the number of days [fol. 462] and performed the services outlined in the statement that you have read.

Mr. Healy: He has also engaged in practice for himself, outside of his employment.

Mr. Langworthy: Yes, he has also engaged in the practice of law for himself, outside of his employment, that is one of the arrangements of his employment, that he can practice, attend to his own business.

He went to New York on his way abroad, spent three days there arranging for witnesses to testify, and investigating some bank transactions, he went to Paris for the same purpose.

Am I right about that?

Mr. Healy: Yes. He was working on this case.

Mr. Langworthy:

Q. And then he was with Mr. Lee in London, as you know from the statement. Those services are included in the detailed statement, in his statement. He also testified that he was successful in ascertaining the facts and the documents that would prove, in his opinion, that the money that is now in the Chicago banks as a part of the trusts involved in this proceeding came from the treasury of the Broad Street Press, Ltd.

Do I state that fairly?

Mr. Healy: The Broad Street Press, I don't know whether it was limited or not, but that identifies it.

[fol. 463] Mr. Langworthy: I state the fact apparently.

Q. That in that connection, he had to trace down some hundred documents, and I think that's all.

Mr. Healy: Well, of course, the statement shows he rendered other services in the matter, investigation of legal questions, appearances in court.

Mr. Langworthy: Oh, yes, the statement shows he rendered other services. I am now trying to make a resume of

the testimony that was given by him, that is material on this question. Have I done it fairly?

Mr. Healy: Yes, I think so.

Mr. Langworthy:

Q. Major Tolman, will you state to the Court what your opinion is as to the value of the services of Mr. Lee in this proceeding, including all the services that he performed?

Mr. Healy: I object to that, if your Honor please, for the reason that the question does not take into consideration that the establishment of the fee in this case is to be upon a contingent basis.

Mr. Langworthy: I will leave that out, if your Honor please, and connect this up.

The Court: Do you include that in your question?

Mr. Langworthy: Beg pardon, your Honor?

The Court: I say, do you include as one of the elements of your question the fact that unless there was a recovery [fol. 464] in this case, the solicitor for the complainant would have received no fee?

Mr. Langworthy:

Q. Will you include in your opinion, Major Tolman, the element in that opinion, that, as you know from the documents that you have read, that there was to be no fee for Mr. Lee unless this litigation should be successful in either establishing a trust and a fund out of which it should be paid, or that there should be settlement? Can you do that?

A. Yes, I can, I think.

Q. Will you please state your opinion, Major, to the Court?

A. Well, I understand there are 241 days of Mr. Lee's time, according to his statement and for a gentleman of the professional attainments and standing of Mr. Lee, I should think that if he had a client who would pay him a retainer, and pay him cash, win or lose, he ought to get two hundred dollars a day for his work in a matter of this sort. In view of the risk and the uncertainty of compensation, and the contingent character of the case, I think he is entitled to double that amount for himself alone. In other words, I think that Mr. Lee should have one hundred thousand dol-

lars net for himself. I take into account the fact that his associate, while admitted to the bar and practicing alone, was in this case not practicing alone, but practicing with [fol. 465] Mr. Lee.

But I think, in view of the circumstances, that there should be an additional ten thousand dollars allowed for the services of Mr. Lee for his associate. I have endeavored to consider the question of a percentage, a reasonable and proper percentage compensation, but I cannot see that under the circumstances a percentage can be applied, for the reason that there was nobody with whom to make; in advance, an agreement with regard to a percentage. There was no existing estate and no existing interests to be united together, or to meet their minds about a percentage basis, so that to my mind it comes back to the question of the value of the services, and not the basis of a percentage.

I have taken into account also the fact—well, before I leave the percentage question, I think I ought to state that if there had been somebody with whom Mr. Lee could have made an agreement that he would prosecute this case on a percentage basis, I don't think twenty percent would have been an unreasonable fee, if there had been persons with whom he could have made that agreement. I take into account also the fact that there is a public interest here, that it is a very large number of people whose money was tied up in this litigation, that gives it somewhat of a different [fol. 466] aspect for the position, in my mind, that it would occupy if persons capable of contracting and in a position to contract had contracted in advance concerning the compensation.

It seems to me that you will have to draw the line a little closer on that account, with those considerations, I have fixed, that I have mentioned, for the services of Mr. Lee, and his office associate. I have examined what the records seem to show about the services of other people, but I have no data on which I could fix,—form an opinion with regard to the value of the services of anybody else.

Q. Major Tolman, I should have asked you, do you know Mr. John H. S. Lee?

A. I do, I know him well.

Q. And you have been acquainted with his practice in Chicago?

A. I know him well and have known him for many years, and know of his standing and practice.

Q. Major Tolman, in your examination of the documents, did you see the document mentioned in the record here as Lee's Exhibit 2, which was a letter sent out by Mr. Pepys, in July, 1932, after the settlement agreement had been signed?

A. No, I never saw that.

[fol. 467] Q. There was attached to that letter—no, that Exhibit 2, was sent out by Wordsworth, Marr, Johnson, & Shaw, detailing their approval of the settlement agreement, Mr. Lee's and Wordsworth, Marr, Johnson & Shaw's approval. At the same time this letter, Lee Exhibit A, was sent out, which is a letter from Mr. Pepys, and asks for the approval. Did you see that?

A. I never saw that.

Q. I will state this letter was sent to the stockholders of the two corporations involved, and in this letter was stated, on the second page, paragraph b, there is a statement with reference to Mr. Lee's compensation.

A. Well, I have now read this paragraph, and I have read references to the same paragraph in other documents, I think in Mr. Lee's statement. I was aware of that.

Q. I also call your attention to the second paragraph, the paragraphs numbered 1, 2 and 3, in the letter that was sent to the interveners when they were invited to intervene in the case.

A. I read it. I have now read it. I never read it before.

Q. Having acquainted yourself with these facts, do these facts change your opinion in any way as to the value of the services rendered by Mr. Lee and Mr. McConnell, taking into consideration the fact that they were employed [fol. 468] with the understanding that they were not to be paid any fee unless they were successful in the litigation, by way of trial or settlement?

A. Well, I have taken into account the fact that this is contingent litigation. I have doubled the allowance that I could possibly arrive at in any other way, I have doubled it because of the contingent character of it.

Moreover, it is an agreement made after the services had been performed, as I understand it. Is that not a fact?

Q. Well, the evidence is that when Mr. Lee was first employed it was.

A. No, but I mean the percentage part of it.

Q. Yes.

A. With reference to a percentage, this document itself is since the services were performed.

Q. The document that was sent out in July, 1932, was after the services had been performed.

A. Yes.

Q. Yes.

A. That one that I last looked at.

Q. No, the one that you last looked at was a letter that was sent out By Wordsworth, Marr, Johnson & Shaw in——

A. August.

Q. (Continuing:) August, 1931, after this amended bill had been filed.

A. Yes. Before the visit to England?

[fol. 469] Q. I beg your pardon?

A. Before the visit to England?

Q. No, that was while Mr. Lee was in Europe.

A. Yes. Well, that is what I thought. No, that would not change my opinion.

Cross-examination.

By Mr. Healy:

Q. You have known Mr. Lee for a good many years, Major?

A. Yes, I have.

Q. Do you know him as a lawyer of attainment?

A. Yes, sir.

Q. And high standing at this bar?

A. Yes, sir.

Q. A lawyer of high reputation and great ability?

A. I have great admiration for him, and I hope a sincere friendship.

Q. Now, you say that if the parties had been in a position to contract for a fee at the inception of this litigation, and had agreed upon a fee on a twenty percent basis, that that would not be unreasonable or improper?

A. I think it would not have been.

Q. They might have even contracted for a fee of thirty-three and a half percent, and that would have been reasonable, would it not?

A. Well, when you come to dealing with such large mat [fol. 470] ters as a million three hundred thousand dollars, I am not going to go very much over twenty percent.

Q. Yes, I know. But you are looking backward now, in determining the matter?

A. Quite likely.

Q. I am asking you now to put your mind in a position, if you can, which was occupied by Mr. Lee at the inception of this litigation. You could not know then what the recovery was going to be, or whether there would be any recovery.

A. No.

Q. And he knew at the outset that whatever fee he received for the services which he might render in the matter was entirely dependent upon the outcome of the litigation.

A. Yes.

Q. If he got a hundred thousand dollars, his fee would be a comparatively small one, and if he recovered a larger amount, his fee would increase proportionately?

A. Yes.

Q. You know that the courts have approved in this jurisdiction contingent fees that run from thirty-three and a third percent to fifty percent, don't you?

Mr. Langworthy: I don't think that is material.

A. I think I know what they are. The Probate Court [fol. 471] fixes them by order all the way up to fifty percent.

Mr. Healy:

Q. Yes. And the Supreme Court in a number of cases said that when the parties were in a position to contract for even a fifty per cent fee, it was a proper fee to allow the lawyer?

A. Yes, contingent fees are really fully recognized in the law.

Q. And you recognize, from your examination of the records in this case, you recognize that this was a highly complicated law suit, and one that would give a great deal of difficulty to the lawyer who was prosecuting the cause of the plaintiffs?

A. It was an important and difficult case which would call for the best efforts of a man of high ability, that is right.

Q. And it was not only difficult in its facts, and in the law, but the difficulty was further heightened by reason of the fact that the clients were residents of a foreign country.

Q. Well, they were residents of a foreign country.

Q. And the facts had to be gleaned over there?

A. It required more work, yes. Of course, the heart of this thing was to catch this money here.

Q. Yes. And the lawyer who succeeded in doing that did a very good job for his clients.

[fol. 472] A. Well, he did the business that was done.

Q. Sir?

A. He is the man that scored.

Q. Yes. And the laborer is worthy of his hire.

A. Yes, he is.

Q. Even though he is a member of the bar. Now, you have not taken into consideration in determining with draw that temporarily. You have said that for the services which Mr. Lee rendered himself as indicated by his statement, you think he ought to receive out of this fund a hundred thousand dollars.

A. Yes, sir, I mean a hundred thousand dollars net to him.

Q. Net to him?

A. That is what I mean.

Q. Without the necessity on his part of dividing any part of that hundred thousand dollars with any other counsel who was associated with him in the case?

A. That is my view.

Q. Sir:

A. That is my view.

Q. And you have not taken into consideration what he will have to pay out of any fee which the Court awards to his associates in the matter?

A. You mean his immediate associate?

Q. Well, not only McConnell, but Wordsworth, for instance, who was the English solicitor in the matter.

A. You know, I just simply have no data on which I [fol. 473] could appraise the value of Mr. Wordsworth's services, or any of the services rendered by him.

Q. The inquiry here, is, as I understand it, the value of Mr. Lee's services, based on a contingent basis, and the

arrangement which he has to pay his associates a part of his fees is simply incidental to that question.

Mr. Langworthy: Well, I object to that.

A. It is quite incidental to me, too.

Mr. Langworthy: I asked the witness about Mr. Lee's and Mr. McConnell's services.

Mr. Healy: All right.

Mr. Langworthy: I have not gone into the services of Mr. Overmyer or the others, all the English solicitors.

The Court: Does the contract, Mr. Langworthy, provide a fee here to be allowed to the claimant?

Mr. Langworthy: The total sum, your Honor.

The Court: The total sum is to be allowed to the claimant, and it is referred to as the claimant's, Mr. Lee's fees. In other words, the amount is for the benefit of Mr. Lee, and he is to take care of his associates. In other words, he is to be awarded in this case a lump sum, out of which he has to take care of counsel's work, or the work of these other gentlemen who assisted him in the case.

Mr. Langworthy: May I call your Honor's attention to [fol. 474] the exact wording? "The attorney's fees of Mr. Lee shall, after hearing first had thereon, as hereinafter provided, be fixed and allowed to the plaintiffs and interveners in the said cause pending in the United States District Court of the Northern District of Illinois, and should be charged only"—and so forth. "Such attorneys' fees to include, upon proper proof thereof, such legal services as have been rendered to Mr. Lee and which Mr. Lee has obligated himself to pay".

The Court: That is the part I had in mind, "which he has obligated himself to pay".

Mr. Langworthy: Yes.

The Court: So that evidently Mr. Lee has obligated himself to pay out of whatever is allowed to him in this case a certain portion, he has made that agreement.

Mr. Langworthy: Yes, your Honor, and as to that, he has obligated himself to pay Mr. McConnell, and I have covered the value of Mr. McConnell's services in my question, and Major Tolman has testified to it.

The Court: Now, he is obligated to pay Mr. McConnell, isn't he?

Mr. Langworthy: Beg pardon.

The Court: He is obligated to McConnell eight per cent of what he gets.

Mr. Langworthy: Yes.

[fol. 475] The Court: Eight percent of his fifty percent.

Mr. Langworthy: Yes.

Mr. Healy: Yes.

The Court: He has obligated himself to pay Wordsworth twenty percent.

Mr. Langworthy: Yes.

The Court: Of the amount that is awarded to him in this case.

Mr. Langworthy: That is right.

The Court: And Wordsworths have obligated themselves to pay Ovefmyer thirty percent of the amount they get in this case.

Mr. Langworthy: Yes.

The Court: If he is to have a hundred thousand dollars net, and there is an allowance here which covers what he obligated himself to pay, the witnesses are not very far apart, are they?

Mr. Healy: No. The Major gives us more than Mr. Penney gave us in his testimony.

The Witness: Well, I would not be sorry about that, either.

Mr. Langworthy: Now, if your Honor please, may I be heard a moment?

The Court: Certainly.

Mr. Langworthy: It is not the purpose of us to go into the value of Mr. Overmyer's fees. Mr. Lee has stated on [fol. 476] the stand, and he makes no claim for anything that Mr. Overmyer did.

Now, this is not a contract to pay Mr. Lee anything and everything that he has obligated himself to pay to attorneys.

The Court: I think I understand your point. The only observation I care to make at this time is, that if Mr. Lee is to have a hundred thousand dollars net under the provisions of this agreement, there will have to be a very much larger sum awarded than a hundred thousand dollars, or even a hundred and ten thousand dollars, or otherwise he doesn't get a houndred thousand net.

Mr. Langworthy: Of course, it is a mere matter of computation to add eight percent for Mr. McConnell, it is a mere matter of computation to add the twenty percent for Mr. Wordsworth.

Mr. Healy: But your arithmetic is all wrong. You are starting out with the lowest possible sum, and making a division, instead of starting at the top, and dividing down.

Mr. Langworthy: No, I added the right way, I figured it out in the right way, I know a little bit about the thing. Don't try to make me out ridiculous.

Mr. Healy: I am not trying to do that, Mr. Langworthy.

Mr. Langworthy: The point I am making is, that this [fol. 477] decree does not undertake, or this agreement does not undertake to agree that the Court shall allow any sum to Mr. Lee, except for such legal services as have been rendered to Mr. Lee, and which Mr. Lee has obligated himself to pay.

Now, if Mr. Overmyer rendered legal services for which Mr. Lee claimed—and I asked him the question directly, and he said he makes no claim for the Court to allow anything in this case of legal services that Mr. Overmyer has rendered.

Mr. Healy: Now, what was the question that brought about all this discussion? Let me say to my brother Langworthy, I was not making an effort to make him ridiculous. I was simply urging that he was in error in the manner in which he was elucidating his proof.

Mr. Langworthy: If you have a certain sum that amounts to eighty percent of a hundred percent, you simply divide by four and multiply by five to get your hundred percent.

Mr. Healy: Now, what is the question?

(The pending question was read by the reporter as above recorded.)

Mr. Healy:

Q. Now, Major, you concede, do you not, that litigants or persons who are interested in a common fund are in a position at any time during the pendency of the litigation to agree upon the amount of remuneration or compensa- [fol. 478] tion that he shall receive?

A. Yes.

Q. Has it been called to your attention that when this contract of settlement was made, it was dependent upon

its approval or ratification by the real parties in interest, I mean the people who would be entitled to receive, at the hands of the liquidator, their proportionate share of the money which is recovered in this litigation?

Mr. Langworthy: I object to that as immaterial. It hasn't anything to do with the value of the services.

A. I am not sure that I know the state of the record about that, but I presume that your statement is correct, that they did have something to say about that settlement although I am not clear whether that settlement required the consent of everybody or not.

Mr. Healy:

Q. Well, the agreement reads that as this agreement becomes null and void unless the necessary consents of the Vulcan and Rhodesia shareholders are received within a limited number of days, it is of the utmost importance that there should be no delay on the part of those who approve the proposed compromise in signing and returning the attached form.

A. Yes. May I have that a moment?

Q. That is the last paragraph.

A. I want to see which one that was.

[fol. 479] Mr. Langworthy: It wasn't in the agreement that was in the letter that Pepys sent out. That hasn't anything to do with the value of the legal services.

Mr. Healy: Well, the document speaks for itself, and that is the document which Pepys sent out——

Mr. Langworthy: Surely.

Mr. Healy: —to the parties, the shareholders, and that is the document upon which they acted, I assume.

Mr. Langworthy: Certainly. His attention has been called to the paragraph in that document that related to attorneys' fees.

Mr. Healy: Don't let's argue the matter now. Let's get our proof in, then let us argue.

Q. Now, in this same document, Major, the liquidator, the official receiver in Great Britain make the statement to the parties to whom the notice is sent that in payment of Mr. Lee's remuneration and disbursements to be fixed by the Judge of the District Court, it will probably be fixed

on a percentage basis, "and Mr. Lee informs me that he will ask for an allowance of twenty percent or more of the above mentioned sum of approximately 360,000 pounds."

Your attention was called to that paragraph in the document?

A. Yes.

Q. Now, do you know, Major, that after that notice was [fol. 480] sent out to the persons who are entitled to participate in this fund, that all of the parties who are plaintiff here approved that arrangement, 99½ percent of the clients represented by Mr. Lee and Mr. Wordsworth approved it, and 96 percent of the others, of all other persons interested in the fund approved it, or at any rate offered no objection to the adjustment of the matter as indicated in this letter.

I am in error about that. They approved in writing the adjustment of the matter as indicated in this letter, Lee Exhibit A.

A. Yes.

Q. So that, so far as those persons are concerned, they are not objecting on this record.

Mr. Langworthy: I object to that statement.

Mr. Healy: To a twenty percent allowance to Mr. Lee.

Mr. Langworthy: I object to that statement.

Mr. Healy:

Q. Do you understand that to be the fact?

Mr. Langworthy: I object, if your Honor please.

A. Well, I understand——

The Court: He is asking him.

A. I understand just what that says there, that they agreed to a fee to be fixed by the Court.

Mr. Langworthy: That is all right.

A. (Continuing:) And that probably Mr. Lee would ask [fol. 481] for twenty percent fee?

Mr. Healy:

Q. Twenty percent or more.

A. Yes, twenty percent or more.

Q. And they interposed no objection to that, but in writing expressly approve the suggestions and statements made in the document.

A. Well, I understand that. The question addressed to me was what my opinion was as to the value of the services. I tried to give that.

Q. Yes. But your opinion of the value of the services of course would not be determinative against the decision of the real parties in interest.

Mr. Langworthy: I object, if your Honor please.

A. I have no very great admiration for my opinions. It might not be worth anything.

Mr. Healy:

Q. Well, I have a high regard for your opinion, else I would not be spending so much time asking you these questions. Now, your opinion is that Mr. Lee, as I say, should get, exclusive of any division of his fee with anybody else, a sum of one hundred thousand dollars.

A. I think the services rendered by him well worth a hundred thousand dollars, under the circumstances.

Q. Yes. And if, as you say, the parties who are interested in the litigation had been in a position to contract with him, and had contracted for twenty percent or thirty [fol. 482] percent of the recovery, that would be not unreasonable or excessive?

Mr. Langworthy: I object to the thirty percent being injected. He hasn't said that.

Mr. Healy:

Q. Well, twenty percent or more, we will modify the question to that extent.

Mr. Langworthy: He didn't say "more."

A. I think twenty percent would have been reasonable made in advance, made in advance by those that were in a position to do it. Perhaps a little more would have been, but it is about as far as I personally would feel like going.

Mr. Healy:

Q. And your understanding of the situation, when you expressed the opinion which you have expressed here on

the stand, is that none of the parties in interest have acquiesced in any way to the allowance of a definite fee to Mr. Lee.

A. Well, I read that, that they agree to a fee to be fixed by the Court, and the statement that it would be asked for on a percentage basis, probably of twenty percent or more. I know that.

Q. You are also advised or informed that they have not protested or objected in any way to that arrangement?

A. Well, I am assuming that, too. That is another question.

The Court: The question to the Major is as to his opinion [fol. 483] of the value of these services, independent of any agreement of the parties.

Mr. Healy: Yes.

A. Yes, your Honor. The agreements do not cut any figure in my mind at all.

Mr. Healy: That's all.

Mr. Langworthy: That's all Major. Thank you very much.

The Court: That's all.

Mr. Langworthy: Do you want to cross examine?

The Court: Is there any additional testimony, or does that close the case?

Mr. Langworthy: Is there any further question any of you gentlemen want to ask Major Tolman?

(Witness excused.)

COLLOQUY

Mr. Gilbert: If your Honor please, there is one more item of evidence to be considered, and that is the amount of out-of-pocket expenses of Mr. Lee.

Now, I have said that Mr. Lee might, as far as I was concerned, present the matter by advising us in a statement of some kind. I haven't seen it yet. It may be we can stipulate it.

Mr. Lee: Here are the expenses of Messrs. Wordsworth, Marr, Johnson & Shaw, $8,881.50, and we have made an

estimated trip for Mr. Perry on the way to Chicago of $800.00 round trip. Now, I think this, if the Court please. [fol. 484] We do not want a dollar more than the exact figures. We put this in, and if he puts the matter in, I will agree with you that we will submit the exact statement, and give you this entire matter, the exact statement, and if we have received a dollar more, we will pay that to Mr. Pepys, just for the purpose of not keeping the decree back.

I have figures that in pounds and dollars as $3.46, the rate of exchange today. That is considerably less than the rate of exchange when we were in London.

Mr. Gilbert: May it be stipulated for the record that the Court may take the out-of-pocket expenses of Mr. Lee to be $9,881.50, in view of what Mr. Lee said, in regard to any exchange?

Mr. Lee: That is in addition.

Mr. Gilbert: That is in addition.

Mr. Lee: That is $1,134.64.

Mr. Gilbert: The statement of Mr. Lee that that bears out—this is what is to go into the decree, and if there is any adjustment to it, you will do so.

Mr. Lee: Adjusted with Mr. Pepys.

Mr. Langworthy: I haven't anything to do with the out-of-pocket money.

Mr. Gilbert: Well, it may be so stipulated.

Mr. Langworthy: My instructions are that the Court is [fol. 485] to fix the out-of-pocket money upon the signed statements to be furnished by Mr. Lee.

Mr. Gilbert: All right.

Mr. Langworthy: They are not questioning them in any way.

Mr. Gilbert: Let the record show it is stipulated by and between attorneys for plaintiffs and interveners and the attorneys for the defendants, that the out-of-pocket expenses may be fixed by the decree, and awarded to Mr. Lee, in the sum of $10,716.14.

Mr. Kearns: Will you specify the defendants, Mr. Gilbert?

Mr. Gilbert: With the exception of two defendants, all the defendants that are presently defendants in the case except the Foreman Trust & Savings Bank and the First Union Trust & Savings Bank, and the Guardian Ad Litem.

Just to clear it for the Court's attention, this money goes back to the people that advanced it.

The Court: Oh, yes.

Mr. Gilbert: The decree so provides.

The Court: Does that close the record, as far as you are concerned? Do both sides rest?

Mr. Lee: Yes.

Mr. Healy: Yes, your Honor.

The Court: Now, with reference to the argument in the case, the matter which I mentioned this morning, namely, a meeting of our judges in the District Court concerning a [fol. 486] matter of our work was set for three o'clock this afternoon, which the other judges have arranged to attend, will make it impossible for me to hear the argument this afternoon. However, I will come in tomorrow morning if you desire to argue the case at 10:30. Do you thing you can present anything that you have to submit by noon?

Mr. Healy: Oh, yes, I think so.

The Court: An hour and a half?

Mr. Healy: We are perfectly willing to be limited.

The Court: Well, I don't care to limit you. After all, the testimony of the two experts is not so widely divergent, they are not so widely apart, as it might appear at first glance. I didn't get exactly what Mr. Tenney said on cross-examination, when the questions were put to him about the Overmyer matter. In his case I would like to have you look that up in the record.

Mr. Healy: Very well, your Honor.

The Court: And bring it to my attention tomorrow morning.

Mr. Healy: We will have that here.

The Court: Exactly what Mr. Tenney said about that. This room, as he said, is not a very good room, and I didn't get exactly his answer as to some phases of the matter. I think Major Tolman's testimony is perfectly clear. He said Mr. Lee should have a hundred thousand dollars for [fol. 487] himself, and ten thousand dollars for Mr. McConnell. And he has not undertaken to place any value upon the services of the English solicitors. It is conceded, of course, there must be something for the English solicitors; but on his testimony, a hundred thousand dollars to Mr. Lee, net, and ten thousand dollars to McConnell, and the reasonable value of the services of the English solicitors.

So there really isn't anything in the record, except Mr. Tenney's testimony, on the subject of the value of the services of the English solicitors.

Mr. Healy: Except as Mr. Lee pointed out.

The Court: Of course, the Court is not going to decide the case on the testimony of the expert alone. I may say we have a rather wide experience in the fixing of fees.

As I have said, we have probably paid out more money to lawyers than any other one single agency in Chicago in those cases. We have had some cases involving very large solicitors' fees. I recall one case which I heard, where there was a recovery of a million eight hundred thousand dollars, where an attorney at this Bar was awarded six hundred thousand dollars fees, where he created the law suit, where, but for him, there wouldn't have been any law suit, if it hadn't been for the lawyer.

As I say, we have had experience, since I have been on the bench, with many of these cases, and about the only [fol. 488] thing of consequence in the case is just what consideration, if any, the Court should give to the Overmyer issue, how it should be treated.

Mr. Langworthy: I think, if your Honor please, that Mr. Lee is certainly bound by his statement on the stand, in response to what I asked him. I didn't ask Major Tolman about it.

The Court: I have not begun to decide the case.

Mr. Langworthy: No, I understand.

The Court: I have merely made these informal observations, so you will know what is running through my mind, and when you come to argue the case tomorrow, speak to what is in the Court's mind about it.

Mr. Gilbert: Mr. Lee has just said to me that if the meeting of the judges which you are going to attend will be a brief one, it might be that your Honor can return here, and we could conclude our argument this afternoon.

The Court: No, I don't believe we are going to get away from there before half past four or five o'clock. I know we have three or four matters to discuss, and I think it would be undesirable for us to try to argue the case this afternoon. I would like to do it myself.

Mr. Healy: I have the Tenney testimony here, but I will indicate the part of the record to which your Honor referred.

The Court: I didn't want to come in tomorrow myself, [fol. 489] but I will do it.

Mr. Gilbert: One other thing, your Honor. It is the desire, if at all convenient to your Honor, that your Honor decide and fix these fees immediately, or as quickly after the conclusion of the argument, as can be done.

The Court: Well, as I am at present advised, I think I will decide this case tomorrow. I am not sure about it. I never promise definitely in advance what I will do. Unless something arises here in the argument in the morning, I think you can expect a decision.

Mr. Langworthy: I would like to have your Honor not decide it tonight.

The Court: I shall certainly not decide it tonight.

Mr. Langworthy: Keep your mind open until you hear the argument.

The Court: I certainly will not decide it tonight. I merely say that it is the kind of a case that I would be very likely to decide from the bench.

(Whereupon an adjournment was taken until 10:30 o'clock A. M. of the following day, being Saturday, September 24, 1932.)

[fol. 490]

FABER

v.

FACTOR et al.

Before Judge Wilkerson

Saturday, September 24, 1932, at 10:30 a. m.

Met pursuant to adjournment.

Present: Mr. Butler, Mr. Carter, Mr. Gilbert, Mr. Lee, Mr. Healy, Mr. McConnell, Mr. Langworthy, Mr. Kearns, Mr. Perry.

The Court: You may proceed.

Mr. Carter: If your Honor please, I assume that Mr. Healy will open this argument. Before he does, I just wanted to make a very brief statement in behalf of our client, Mr. Factor

Mr. Healy: Will you pardon me a minute, Mr. Carter? Mr. Perry, if your Honor please, of London, has just arrived in the city this morning, and it was our intention to [fol. 491] put him on the stand to testify at some considerable length, but in the interest of economy of time, we decided to not call him except with reference to one aspect of the matter.

The Court: Who is Mr. Perry?

Mr. Healy: Mr. Perry is associated with Mr. Wordsworth's firm in London.

The Court: Oh, yes.

Mr. Healy: Counsel informed me when I told them it was our intention to call him that they would concede and stipulate that in the latter part of July, 1932, in July, the official liquidator, Mr. Pepys, sent out to the claimants to the fund which has been recovered as a result of this law suit, and in reaching his estimate of a 25 per cent return to the claimants Mr. Pepys took into consideration and deducted from the recovery, tentatively, at least, a fee of Mr. Lee in the amount of 20 per cent of the amount recovered.

I don't know that your Honor is entirely familiar with the contents of this letter.

The Court: No, I am not.

Mr. Healy: But, in that letter Mr. Pepys sent to all of the claimants, all of the creditors, a letter in which he outlined, summarized the settlement agreement and recommended [fol. 492] and advocated its acceptance by the claimants and suggested in that letter that in the event the settlement went through they could hope to receive about 25 per cent of their claims.

Now, in arriving at that estimate Mr. Perry has testified, Mr. Perry would testify, and counsel now concede that he deducted from the amount of the recovery a 20 per cent fee for Mr. Lee.

Mr. Langworthy: He necessarily had to do that.

Well, he did it because the agreement provides, and he was informed, that Mr. Lee was going to ask for a 20 per cent fee, and he could not tell what amount would be awarded, and we concede that would be necessary, he would have to deduct that, in making his estimate.

It does not carry any implication that the Court should adopt it.

Mr. Healy: No, but we think it is significant, in the light of certain testimony which was given here, and we simply want to show that the estimate was based on that sort of a reduction, and we are going to contend in the argument, at least, that the claimants and creditors and those concerned have all expressly acquiesced in that suggestion.

[fol. 493] Mr. Langworthy: If your Honor got what I said before, I did not wish to repeat myself, but it does not carry any implication.

Mr. Healy: That is a matter of argument.

Mr. Langworthy: It does not carry any implication that Mr. Pepys or the claimants concede that Mr. Lee should be paid 20 per cent, or that your Honor should adopt that at all, because his employment required that he be paid a fee to be fixed by your Honor and not by himself.

The Court: There is one matter, Mr. Langworthy, I would like to have you enlighten me about, if you can. Are you able to advise the Court whether or not Mr. Pepys, the liquidator, I think that is his title, and the department of the British Government by which he is appointed, and the British consul and the department of the British Government which is responsible for the appointment of the British consul, are fully aware of the amount of money which Mr. Overmyer is to receive in this case, in this matter?

Mr. Langworthy: If your Honor please, I can answer the fact——

The Court (interposing): If you cannot, I would like to have the British consul and Mr. Overmyer testify in this [fol. 494] case, if they are willing to do so.

Mr. Langworthy: If your Honor please, I can answer in this way, that in July, 1931, when Mr. Lee was in London, he got a letter of introduction from Mr. Overmyer to Mr. Wordsworth, and was introduced to Mr. Pepys, and requested and obtained Mr. Pepys' consent to Mr. Wordsworth acting in co-operation with Mr. Lee, and gave his consent to Mr. Wordsworth obtaining from his files the names and addresses of the stockholders of the Rhodesia and Vulcan companies, and consented to the letter that is in evidence which was sent to such stockholders with a view of their employing Mr. Lee in this proceeding.

At that time Mr. Wordsworth was the counsel for the solicitor—I should say for Mr. Pepys—I think Mr. Perry is

here and I want him to correct me if I make any mistake in the fact that——

Mr. Carter (interposing): May we interrupt just long enough to introduce Mr. Perry to the Court—Judge Wilkerson.

Mr. Perry: Thank you.

Mr. Langworthy: He arrived this morning, he tells me.

Now, in January, 1932, the contract, a contract that has [fol. 495] been offered in evidence, between Mr. Overmyer and Mr. Lee arrived at Mr. Wordsworth's office, and Mr. Wordsworth wrote a letter and transmitted it to Mr. Pepys. Mr. Pepys made a copy of the contract and the correspondence accompanying it. That contract and the correspondence was furnished to me with my instructions which were that in the opinion of the senior official receiver no allowance should be made in this case for Mr. Overmyer's services that were rendered to the British Government and presumably remunerated in that way, that no allowance should be made in this case to Mr. Wordsworth or to go to Mr. Wordsworth for his services that he rendered, for the services that were rendered by Mr. Wordsworth to the senior official receiver and remunerated for by him.

I do not understand from the state of this record that Mr. Lee is making any claim contrary to that.

Mr. Lee: Not for one hour of time.

Mr. Healy: No.

Mr. Langworthy: So, all I can say is in answer to your Honor's question, speaking from the record and what is in evidence before you—I have a little additional informa- [fol. 496] tion that came in a letter today that I don't suppose would be proper for me to state—two letters that Mr. Perry brought along—the senior official receiver did know of the making of this contract between, the contract of Mr. Lee and Mr. Overmyer; he did know that Mr. Wordsworth was co-operating and was going to co-operate and furnish anything that he could to help along this case on behalf of these plaintiffs and interveners, and from January, 1932, on Mr. Wordsworth retired as solicitor for the senior official receiver in this matter. He is still its solicitor.

Mr. Perry: Still solicitor.

Mr. Langworthy: But in this matter, in January, 1932, the senior official receiver called in Dr. Clark, who employed me, an eminent solicitor of the bar—am I right?

Mr. Perry: Yes, quite right.

Mr. Langworthy: Dr. Clark, he is a Ph.D., and since then Dr. Clark has been advising Mr. Pepys. My instructions have all come from him.

Have I answered your Honor's question?

The Court: No, not so far as the counsel is concerned.

Mr. Langworthy: I have some information in the letters that I received today if I had those two days ago I per [fol. 497] haps could have brought out more on cross examination.

Mr. Gilbert: Isn't it true that Mr. Pepys knew of an arrangement between Mr. Lee and Mr. Overmyer for division of fees as early as July, 1931, at least August, 1931?

Mr. Lee: I have testified to that and Mr. Perry is willing to testify to that.

Mr. Gilbert: That he did have.

Mr. Lee: That he did not have. We had no arrangement, no question about it.

Mr. Healy: It is evident from the record in January, 1932, Mr. Pepys knew of the contract because he criticizes certain parts of it, and in answer to his criticism the contract was modified in one particular, at least.

The Court: Of course, however, we may phrase it, the net result of this transaction will be that Mr. Overmyer is to receive a very large sum of money for services which, so far as the record is concerned, are highly nebulous.

Mr. Healy: I think, if your Honor please, unquestionable. I think on argument we can clearly show that is a matter we can show the Court that that is a matter which [fol. 498] the Court does not need to take into consideration at all.

The Court: It may be that the argument is that that is money Mr. Lee is to turn over which he himself has earned, but the difficulty about it is that Mr. Lee does not get it, these claimants do not get it, Mr. Overmyer gets it.

Mr. Gilbert: Our position is that Mr. Overmyer rendered a definite service in an improper way: they were not in the civil case, but he rendered them in another way.

The Court: He has not been called in this case and the Court hesitates to suggest the propriety of calling him—I don't know that there is anything to call him about. The parties in this controversy have made their own record.

Obviously, he was representing the British consul in the extradition case. That is conceded. Presumably he was compensated by the British Government for the services that he rendered in that case. He could not, at the expense of these petitioners, plaintiffs, be compensated for services which he was rendering to the British Government in the extradition case. He had to look to the government for his compensation in that case.

[fol. 499] Now, he did not make this arrangement, by which he was to get this compensation—the question I am rather interested in, he is a member of this bar. We have to deal with the British Government quite frequently. I am just interested in knowing whether the British Government approved the arrangement by which it continues Overmyer as counsel, and permits him to get this money in these claims; it is a question in my mind whether the British Government thinks that is proper.

Mr. Gilbert: They did.

The Court: I don't know but what it is a thing on which you should give Mr. Overmyer an opportunity to be heard himself, if he wants to be heard, for it is a matter of grave concern. If he is to get paid on a percentage of $260,000 it would amount to seventy or eighty thousand dollars that he would get instead of these claimants.

Now, whether the money should go to Mr. Overmyer of whether it should go to the claimants

Mr. Langworthy (interposing): I think, if your Honor please, there can be but one answer to that question in your Honor's mind.

Your Honor has made no contract with anybody; your [fol. 500] Honor is sitting as a Chancellor; your Honor has the interests of these parties, Mr. Lee and these parties, these 2,225 British subjects——

Mr. Perry: 2,275.

Mr. Langworthy: 2,275, Mr. Perry corrects me, and because they happen to be British or because some officer of the British Government hasn't the right idea of ethics, that is no reason why your Honor should not discharge that duty, which I know you are going to discharge.

The Court: Supposing the Court should be of the opinion—I am just putting this hypothetically, just having this little conversation before we start into the argument so that you can address yourself as to what is in my mind

It may be quite aside the point in this case, but the questions are here in a rather peculiar way.

Now, supposing the Court should arrive at the conclusion that on any reasonable basis $250,000 is a fair fee in this case for somebody for the work that was done in the case, but it stands out in this record that out of that $250,000 which the Court orders paid, $70,000 or $80,000 is going to go to Mr. Overmyer?

[fol. 501] Now, is there any way in which the Court can see that money goes to these claimants, is there any way the Court can see that Mr. Lee gets what she should have, and sees that the claimants get the money that goes to Overmyer. Can that be done?

Mr. Healy: I think we can demonstrate on argument that that is beside the question before the Court, that is wholly immaterial. It is no different, if your Honor please, than the monies which Mr. Lee may have paid for his office rent, the monies he may have paid to his stenographer, or what division he may have made with a partner, if he had one.

The Court: It is money he is going to pay to an officer of this Court, and this is a court of record.

I don't know just what if the Court should reach the conclusion this money should not go to Overmyer but should go to these claimants, whether the Court has any power to make an order of that kind or not. It certainly would not do it without giving an opportunity to Mr. Overmyer to be heard.

Mr. Gilbert: I think your Honor gave him an invitation.

The Court: I have not been able to see——

Mr. Langworthy (interposing): Does your Honor wish [fol. 502] to know why I have not called Mr. Overmyer?

The Court (continuing): —any justification for taking this money—I should think that he would turn it over to these claimants, if he is being compensated by the British Government for all of the work that he has done in this case.

Mr. Gilbert: If he did not receive a dime from the British Government for the work in prosecuting the criminal case, he should not have a dime out of this case for that work.

The Court: Oh, no——

Mr. Langworthy (interposing): Is it in your Honor's mind why I have not subpœnaed Mr. Overmyer?

The Court: Oh, no.

Mr. Langworthy: My instructions are that I am to present this matter in a reasonably critical manner.

The Court: You are representing the liquidator?

Mr. Langworthy: Yes.

The Court: I don't know that Mr. Overmyer has rendered service to the liquidator; he has rendered his services to the British Government in another department, employed by the British Government to do it.

Mr. Langworthy: He did represent the liquidator in some matters.

[fol. 503] Mr. Lee: May we argue this, your Honor, after I want to say that after the argument I have no objection to the Court's calling anybody.

The Court: You may argue the case.

Mr. Healy: If it is agreeable to the Court and counsel, in view of his greater familiarity with the matter, I would like to have Mr. Lee open and then respond to anything suggested by the other side.

Mr. Carter: If your Honor please, we do not intend to participate in any discussion of the evidence as to the value of these services, but I would like to take just about 2 minutes to state our position, as it has in part been stated by Mr. Gilbert throughout the trial, and to call your Honor's attention to one or two facts in the record.

In the first place, this settlement was entered into on July 19, 1932, in London by Mr. Gilbert and myself acting in behalf of Mr. Factor as a compromise of a pending litigated matter, and distinctly and expressly without any recognition of liability, civil or criminal, on the part of anybody connected with the transactions, and that is written, as your Honor perhaps noticed, in the very last paragraph of the written contract.

[fol. 504] In other words, we are not here standing by, permitting all of these statements made by various witnesses as to the services and as to the conclusive character of the services, except as carrying out a decree which was initiated in its essential elements at the time of that settlement agreement by Mr. Lee and Mr. Gilbert.

In other words, I simply want your Honor to appreciate we are not conceding—well, of course, concede the fact that Mr. Lee and Mr. McConnell and all these other gentlemen

prosecuted their case vigorously and industriously and ably, that we are not conceding that there was any liability on the part of Mr. Factor. That is the point I want to make.

Now, in the second place, we did say to Mr. Lee, as he has said on the stand, both of us over there, that we were regretful of being put in the position, Mr. Gilbert and myself, of taking any position as to the fees of another attorney in the case, and we did advise our client that we hoped he would not feel he had to take any position on that subject, and he came back at us consistently throughout those negotiations, as Mr. Lee and Mr. McConnell have testified, [fol. 505] that he was concerned, if he was going to make a settlement, even if he was not recognizing any liability, that as much of the money as possible should go to the people who are claiming the money.

Now, he conceded and we conceded that a substantial fee should be paid in this case. But, he took the position, and we transmitted it, as Mr. Lee has testified to them and to Mr. Pepys, that we did not think, Mr. Factor did not think that a fee should be allowed larger than 10 per cent in this case, and it is true, as Mr. Lee explained yesterday, and the only point I was concerned about was not as to what your Honor is going to conclude here, but merely the faith of Mr. Gilbert and myself to the British receiver or liquidator, because of the fact these conferences that are being testified about, Mr. Lee, Mr. McConnell agreed in our presence, and I felt it was a duty on our part to see the facts are reflected here in all their clearness. The thing we were concerned about was the statement of Mr. Lee in the early part of his testimony which he corrected yesterday, that we did not object to the 20 per cent—that was not true. We had stated Mr. Factor's position, and in the course of stating it, I [fol. 506] voiced my own personal view at that time and with the knowledge that was then before us that 10 per cent was a fair fee.

Now, your Honor has commented again this morning about Mr. Overmyer. We, on our side, are not concerned as to what happens to this money after it passes into Mr. Lee's hands, but the point that Mr. Gilbert was making a minute ago, it seems to me your Honor should bear in mind that we cannot by silence put the stamp of approval upon what Mr. Overmyer did here.

We are not concerned. We are not trying to keep any fee away from him. We are not concerned what money ultimately goes to him, but we do say that this Court probably must take into account, as he has in his comments, the fact that the services that Mr. Overmyer rendered were services that he rendered to the British Government, and that the service, whatever it was as to its incidental effect upon this case, was a service for which, as your Honor said a few minutes ago, the British Government should pay him, and probably have paid.

Now, that is all. Now, we have fought a long, hard fight with Mr. Lee and Mr. McConnell, and, as Mr. Lee himself said on the stand, it was a vigorous and perhaps at times [fol. 507] bitter. There is no feeling on our part. It has been a hard fight and it is over, and we hope it is, as we hoped when we made the settlement, a fair settlement of a hotly and bitterly contested matter for the best interests of all of the parties.

The only thing that I have to say in conclusion, and merely parting at this point, about the British receiver is this:

It is true that the British receiver mentioned in there 20 per cent in his letter. I think it is fair to say, and Mr. Langworthy will say it, and it is in this record, that the British receiver did that because the contract provided that your Honor or some other judge of this Court was going to fix what was a fair and reasonable and just fee for the services rendered under all the circumstances. Now, it is not for us in this situation to say what that is going to be. Your Honor has heard the evidence. Your Honor is more familiar than we are with what the proper view should be. We have had a hard fight. They have earned a substantial fee and it is up to your Honor to fix it.

The Court: Do you think that it is within the power of the Court in this case to make an order allowing a fee to [fol. 508] Mr. Lee on the condition that no part should be paid by him to Mr. Overmyer; or, to retain Mr. Overmyer's fee in the register of the court and require Mr. Overmyer to come and make application to the court for his fee?

Mr. Carter: Frankly, to your Honor's question, I do not know.

The Court: I am just asking whether the Court has the power to make an allowance to Mr. Lee on the condition

that he should pay no part of it to Mr. Overmyer, reserving the 22 per cent of whatever is awarded in the hands of the clerk, and Mr. Overmyer to show to the Court what services he has performed; otherwise it should go to the claimants.

Mr. Carter: It may be that the power is in the Court.

Mr. Gilbert: I think the Court has that power.

Mr. Carter: I know of no reason why he hasn't got the power, this is a court with very broad powers.

The Court: I really think that Mr. Overmyer — Mr. Overmyer, of course, has not been before the Court in this case. It may be that his situation in this thing is entirely warranted. He is a member of this bar. If he has earned a fee [fol. 509] under the contract and he came into court — well, there is no reason why the money should not be held by the Court for him to come into court and make a showing. I should think from his own point of view it would be highly desirable. There is a good deal of comment in this case about the contract which he made. Nobody is particularly criticizing Mr. Lee about it, but apparently there was something in this situation which led the parties to think they were constrained to make this arrangement with Mr. Overmyer who, at that time, was representing the British consul in the extradition case. He was paid by the British Government for his services. I should think he would welcome an opportunity to come into court and show what he did. I know I would if I were a member of the bar practicing before the court. I would not take the money if I could not do it. I am perfectly clear about that.

Well, you may go ahead, Mr. Lee.

Mr. Lee: I will speak very briefly. Mr. Healy spoke to me this morning and therefore I just jotted down these matters. Instead of making an argument I want to speak to the Court and suggest my views about the matter.

[fol. 510] I want to be sure that any fees paid here were justified as fair and reasonable. I thought I had gotten three of the outstanding experts in this city, lawyers, to testify, and I had gotten them. If you had just Mr. Healy and the three, I think you would have the four ablest men in Chicago at the bar. I wanted Mr. Strawn to testify because he is probably better known in England than any other lawyer in this part of the country, better known to the lawyers there, and I felt if he testified, as Mr. Tenney did in regard to the fee being very reasonable, I thought

that would be something that would while the English investors have all consented to this -I thought that would be a double insurance to them, just as if one of the leading members of the English bar, whom we happen to know in America, there are one or two of them that we all know, would testify over there, everybody would say that it was clear as crystal.

But, Mr. Gilbert thought there had been some, what is known on the street as "sharp shooters" and he thought it would be well to enter a decree, and I certainly did not object because I was willing to have a decree entered. I think that is a good plan to get the thing out of the way [fol. 511] because I would like to get some other business and go to work, so we agreed to one expert testifying on each side, and Mr. Tenney has testified.

Now, there is always in this kind of a case, in this kind of a case this question arises: Did we make a mistake the way we presented our matter and asked for 20 per cent? Was that a mistake? Here was a case where all of the evidence would have justified me coming in and saying, "I would like 33⅓ per cent." Wouldn't that have been better for me to say, "I think that 33⅓ per cent is a reasonable fee," conceding I had left it at that and gone no further. What would we have had?

We have had the testimony of a distinguished member of the bar, Mr. Levinson, that 33⅓ per cent is very reasonable, a very reasonable fee over here.

Mr. Langworthy: I object to that.

Mr. Lee: The evidence is, my testimony is, that Mr. Levinson told me. I said, "Haven't you been stating to the liquidator I would be paid 33⅓ per cent" and he did not deny it. They did not put Mr. Levinson on the stand, nor would they.

Mr. Gilbert: He is up in Maine.

Mr. Lee: That is all right. Mr. Stein testified the fee [fol. 512] would have been for the services rendered from 33⅓ per cent to 50 per cent; such a conservation, splendid man as Mr. Tenney, said it is 33⅓ per cent. Supposing I said "Here are the plaintiffs. They say 10 per cent." They don't figure it on a percentage basis, but it amounts to that. If Mr. Lee would have said, "Here is 10 per cent on one side and here is 33⅓ per cent on the other side." we will split it and divide it and everybody interested will

be happy, everybody will get what he is entitled to, and so forth. Wouldn't that have been good psychology? I did not say that. I said I wanted just what would be the minimum fee for the services rendered in this kind of a case. I don't want more than 20 per cent. I don't care what the psychology is. In any court I would have done the same thing. I do that with your Honor. I will tell you why. I have noticed your Honor does not hesitate to say, no matter what the exigencies of the situation are, to cut right down to the real situation, analyze the facts, and give a man what the evidence shows he is entitled to.

In other words, in my humble judgment, I have never seen your Honor try and satisfy everybody. You are try-[fol. 513] ing to find out what is the fact, what the decision should be on the facts. So, even if I was inclined, which I would not be, with some other court, to, in a way, traffic with opposing counsel, go and trade around for a position—that is not my attitude here.

Now, then, just what is the precise question, because I want to go along. It is the fair reasonable compensation of myself and associates for services rendered upon a contingent basis.

Counsel said when he opened that he thought Mr. Gilbert and Mr. Carter and I had not been fair with Mr. Pepys. I took exception to that because I am alert to protect myself from any unfairness. Now, he admits to us frankly that he was wrong. In other words, we did not conceal anything from the liquidator because he says now, in his statement to Mr. Healy and to me, he is going to admit the contingent fee was a proper thing to consider, and he was in error and not we. So, that matter disappeared. I am very glad of that because it relieves me from any imputation in the mind of the Court in having been entirely fair in this matter.

Now, what is the legal effect of an agreement to pay Mr. [fol. 514] Overmyer 30 per cent? Am I entitled to any additional compensation by virtue of that fact? I am paying it. Mr. Tenney says, "No"; of course not, none at all. My agreement is not an agreement whereby I could make a contract to pay a certain sum, and under this contract they would be obliged to pay what I had agreed to pay. The question is a question of services, and what were the services rendered.

In other words, Mr. Tenney answered the question in his usual lucid conclusive way by saying that in a firm services are rendered, the firm dividing up the fees; the question is not the number in the firm, the question is, what was the service rendered by the man?

Now, did Overmyer render services here? He did not. He conferred with me—except this, your Honor, and this was a very vital thing, and you can see my position, if the Court please. I know you will hold your mind open to see my position in this matter.

He brought me in touch with British counsel, eminent British counsel, but for which I could not have made the [fol. 515] settlement and could not have succeeded in this case.

In other words, when I went to Mr. Overmyer, what was the situation? Well, let me illustrate. Supposing Mr. Wordsworth had sent this matter to me. I am not here to say that if he had sent the matter to me direct I would not have agreed to a very much larger compensation than he is receiving here. Major Tolman—I don't know whether he ever tried a case in England or not, he did not say that he did, a great many counsel have not. Mr. Tenney is a little different, but anyone who has tried a matter in England knows when you have to get records in, when you have to get your witnesses, when you have to see them, it is impossible to get results; you cannot win your case, and we could not have made the settlement, we could not have made the proof of tracing, and I had to do it.

Now, when I went to Mr. Overmyer, just see what the situation is. I went to the British consul for information, and when I go for information, I try to go where there may be some information, I don't go out and play golf, I go to the places where I may expect information. I went to the British counsul. I was representing British subjects, and [fol. 516] I asked him for the information. He would not even talk with me. That is the testimony. There is no question about it. Then I went down to the next best place, namely, where the testimony was being introduced and I arranged for a stenographer there. Do they bring the Commissioner here to deny that I saw him the next day? That I saw him the next day and had a talk with him? Not at all. There is no question about that. I was trying to get information and arranged for a stenographer.

Then I went around to Overmyer and Judge Petit. And then what did I find? I found Mr. Overmyer was representing not only the British Government, but another department of the British Government, the liquidator. No question about that. He was doing it. That is not brought into dispute. I am not the one, if the Court please, that suggested to the liquidator, one department of the British government, and to the consul, that they employ one man. They did that. I found that. It may be that they are subject to criticism, two departments of the government, for appointing one man.

There are some things here, your Honor knows—that is under the treaty—I don't know it, but Mr. Overmyer ex- [fol. 517] plained it, and your Honor takes judicial notice of it, or I would not refer to the fact, that it is the duty of the British Government to not only try and get the person of the defendant back, but to try and get the funds back.

Mr. Gilbert: That is not true.

Mr. Lee: Then I am wrong. Mr. McConnell says he examined the treaty.

Mr. Gilbert: The treaty provides any property found upon the person of the accused may be returned.

Mr. Lee: Well, maybe I am wrong because I did not look it up, but that was Mr. Overmyer's suggestion. Anyhow, here was Mr. Overmyer admittedly representing one department of the British government, and another, and what I wanted from him was information. And it was not in any way subject to criticism that he should give me information. I was trying to get money for the British citizens. I cannot see anything in that. I would not give a man 30 per cent for that. All I had to do was to wait a little bit and get it. It was to be introduced in a public hearing, if the Court please. That was not the thing. But, what did he do? He gave me a letter to Mr. Wordsworth who was representing the liquidator and I went over there. Then I found out [fol. 518] that Mr. Wordsworth was in close touch with this entire involved situation. I find that he is the very man that can help me in the matter.

We talked with the liquidator and the liquidator did not intervene. I was not going to represent the liquidator. Overmyer was representing the liquidator. It is not pretended that I was trying to get the liquidator away from Mr. Overmyer. Not at all. I hoped the liquidator would

intervene. It did not occur to me that the British Government was making a mistake. They employed Overmyer in two departments. There is no question about that. What then?

Why, Mr. Pepys suggested that Mr. Wordsworth get in touch with these people—his affidavit is here—and Mr. Wordsworth says I at no time suggested that we get anyone in. I was telling them about the situation and trying to get the evidence.

Now, if your Honor please, the Supreme Court of this State says that when a man represents a class suit he ought to try and get as many in as he can, that it is his duty to do it. If he don't do it he is imposing upon the parties. Our Supreme Court says that, and it is good sense, and I [fol. 519] knew it when I went over there. What happened then?

I had not made any agreement with Mr. Overmyer here because Judge Petit would not agree to anything, and a thing transpired when I was in England which has had the result that I have not spoken to Judge Petit since, and I made no agreement there, but I told Mr. Wordsworth I had to have the services of a man just such as he was to help me, and would be glad to make a reasonable arrangement, I would be glad to give 50 per cent if he would help me in getting to some successful conclusion of this thing.

He then ceased to represent the liquidator, but he might have done it. He might have still represented the liquidator with the liquidator's consent and approval. Then what happened? I came back to America and I make this arrangement. Let us see what the situation is then, just so your Honor gets my position here. I found as a result of a letter that Mr. Overmyer had given me—I had gone over and gotten in touch with Mr. Wordsworth and entire good faith was representing those individuals. Mr. Overmyer came to me. He had a letter from Mr. Levinson's firm. "Why," they said, "you are the very person to represent these people, you are representing the liquidator." We [fol. 520] have the letter here. You should be representing these stockholders, you are the person to deal with. We want to deal with you because you are the person to deal with.

Mr. Gilbert: To make a settlement.

Mr. Lee: Yes, but it is immaterial whether it is a settlement the question here is not a question of whether it is a settlement or lawsuit, the question is whether Mr. Overmyer should have been representing two departments of the British Government.

They had been seeing the department down in Washington. I think Mr. Levinson, a man of good standing, it cannot have entered his mind, after he had talked with the department down in Washington and after he had talked with the liquidator here, that he was doing anything wrong in saying that Mr. Overmyer was the person to represent them. It did not occur to me, it wasn't my I did not think that there was anything wrong. I was not responsible for Mr. Overmyer representing two departments, and I was only dealing with him in connection with the liquidator.

Now, he had given me a letter, he had kindly given me a letter, and I had gone to England. He says, "I ought to have some compensation in this matter." Now, he was [fol. 521] going to, after the proceedings, the criminal proceedings were ended, assist with the depositions, he was going to do something of that kind to assist, after the criminal proceedings.

What should I say? I could have said this, "Mr. Overmyer, listen, I have no legal obligation to you at all," and furthermore a thing transpired over in London that I did not like. I had to be fair. I have to live with myself. What did I say, "I will make an arrangement with you, I will stand by my agreement. You have done this. It is a very valuable thing." Now, the value of a man's services is not represented—why, if your Honor please, take a forwarding fee. A firm of attorneys sends you a claim this is a little different, but an attorney sends you a claim, and you give them your terms—we do that right along. It is generally known. They don't do it because the man is rendering them services, but because he has done something of value. Mr. Overmyer did something of value, not because he was rendering any services, but because he had introduced me to counsel.

Suppose, now, that I had said, "I will stand on my legal rights, nothing for you. True, you did that, it was very nice of you: I won't give you a cent."

[fol. 522] I did not think that was moral. I did not think it was reasonable. I did not think it was fair. So, I fried

to do the fair thing. Overmyer then told me—now, I only know what he said, he said he had taken it up with the consul. I testified to that. I have no objection to Mr. Overmyer taking the stand. I only know what he told me. Mr. Levinson had been talking with the British Government all along, talking with them. I don't suppose he concealed the fact that he was also negotiating with Mr. Overmyer. He would not do a thing of that kind, not for a minute. The British Government must have known that the two departments of the government were acting in harmony. In other words, that is the way it seems to me, anyhow. I would not think of it in any other way. Therefore, when Mr. Overmyer told me he had taken this up with the consul I knew that that must be true, because Mr. Levinson had been negotiating with both of them right along, and there is the situation.

Now, I just wanted your Honor to see my point of view.

The Court: I have your point of view. That prompted [fol. 523] my question here a while ago whether this Court had the power, if I should reach the conclusion that the 20 per cent of $269,000 due you and Mr. McConnell and Wordsworth, which you and Mr. McConnell and Mr. Wordsworth are to receive, is a fair, reasonable compensation for the services that you three solicitors rendered in this case; whether the Court had the power to make an order of present payment to you of the amount, less 30 per cent, the amount which the contract fixes, and have that 30 per cent retained here subject to the further order of the Court and the Court decide whether that is to go to Mr. Overmyer or to go back to these claimants, because that thing is running through my mind pretty strongly. That is about what I have decided to do, if I have the power to do it.

Mr. Healy: This is the thought I had in mind with reference to that. In the first place it is my contention that the Overmyer matter is something with which the Court is not concerned, under the issues of the case.

The Court: I was inclined to agree with you about it yesterday, but I got to thinking about it last night, and I have some rather grave doubts whether I can escape being concerned.

[fol. 524] Mr. Healy: Let us assume that Mr. Lee has a contract with Mr. Overmyer as a result of which he has agreed to pay him a proportionate amount of the fee, a

proportionate part of the fee which he recovers in this case. Let us assume that the Court orders or requires the banks to deliver to the clerk of the Court

The Court (interposing): I would have it paid to the clerk.

Mr. Healy: I don't know what Mr. Overmyer's attitude is, I never talked with him about this matter. I knew him in a casual way, simply having seen him, but never discussed any aspect of the case with him. But, suppose the money is impounded and Mr. Lee says to Mr. Overmyer, "Well, I guess you have to go into court and intervene in order to get your share of the fee, or"

The Court: Or I will sue you.

Mr. Healy: Yes, or I will sue you under the contract; I don't care what the Court has done.

The Court: Well, Mr. Lee and Mr. Overmyer are officers of this court, and haven't I the right or power to have the question of Mr. Overmyer's right to do what he did

[fol. 525] Mr. Healy (interposing): I would have no objection to the Court exercising that power.

The Court: Sometimes we exercise a power when we have doubt about it in order that justice may be done.

Mr. Healy: I was only thinking of the legal obligation that Mr. Lee had under his contract.

The Court: I thought of that as one complexity. Go ahead, Mr. Lee, excuse my interrupting.

Mr. Healy: A part of that Overmyer fee Mr. McConnell is interested in.

The Court: Yes, that is clear, too, he is dependent on that compensation. However, I guess that if I exercise the power that I can go one step further and control that, too. In other words, I could see that Mr. McConnell is compensated.

Mr. Lee: I have no objection to the Court doing anything. I have always abided by my legal obligations, and if the Court should enjoin Mr. Overmyer from receiving or from—if the Court should enjoin my paying anything to Mr. Overmyer I have no objection. But, unless I am enjoined or unless there is some legal reason why I should not pay it, I will pay it.

The Court: Yes, it would be your duty to do it.

Mr. Lee: In other words, I have never been sued yet.

[fol. 526] The Court: And unless you were tied up by the Court in some way it would be your duty to do it.

Mr. Lee: Let me say one word about the evidence. Mr. Healy just asked me to refer to this and I will do it very briefly.

Here is the way the situation sizes itself up to me. We have gotten the issue, from my point of view Overmyer, what he did or did not do does not add a dollar to the situation, because he did nothing.

Now take, for instance, a forwarding fee. That would not be a matter for the consideration of the Court here. Supposing a man forwards a matter to me, what he gets would not add to my compensation. It is what I did. Of course, the situation with Mr. Wordsworth is entirely different, because I believe that he contributed no tremendous amount towards the settlement.

The Court: There is no question about Wordsworth's 20 per cent on the record, in my opinion.

Mr. Lee: Here is the situation about the 20 per cent you say there is no doubt about the fairness of the 20 per cent on the record.

The Court: It does not seem to me.

Mr. Lee: Then I don't care to argue it.

[fol. 527] The Court: I don't think anybody is questioning that.

Mr. Gilbert: Nobody is questioning that.

The Court: Nobody is questioning Mr. Wordsworth's services.

Mr. Langworthy: I am not raising any question.

Mr. Lee: I will state it in about 2 minutes, the situation, the way it sizes itself up to me. Mr. Horace Kent Tenney, I think he is one of the keenest minds I have ever been against. I remember that one time I went down to Springfield and he was on one side of the case and I was representing the Municipal Court and he was representing some other body and somebody from the West Side wanted to intervene because he said that Tenney and I had agreed between us and that there would not be a bona fide argument. The Court laughed and let him intervene.

Well, Mr. Tenney argued his side with the utmost keenness and he was kind enough to say that I had made a pretty good argument, too, but as we went out the door,

he said, "I guess no member of the court will think there was any agreement between you and me in this case."

The Court: I practiced with him for about 10 years so [fol. 528] I know something.

Mr. Lee: I had forgotten. Then, I do not have to say much. I think mentally he is one of the most alert men I have ever happened to go against. You are always liable to get cut if you happen to go against him. Furthermore, he has this ability, that he would not say that I was entitled to 20 per cent, on the stand, even if I was his very best friend unless he really believed it; he would not come here as an accommodation to me or to anybody.

The Court: You need not praise either of the experts to the Court because both Mr. Tenney and Major Tolman stand very high in the opinion of the Court.

Mr. Lee: Here is the situation, then. There is Mr. Tenney's testimony. He tells, as Mr. Healy—Mr. Healy referred to that so I will pass on to something else.

Now, Mr. Levinson has said that the Court would award me 33⅓ per cent. I think I know Mr. Levinson. He meant it when he said it. It is in the record. Mr. Stein said 33⅓ to 50, and the Court of Appeals in this district said that 33⅓ per cent is a reasonable amount.

Then, my testimony is here, if it is entitled to any weight. [fol. 529] The Court: I know that Mr. Aldrich got a fee of $600,000, contingent upon the recovery of $1,800,000.

Mr. Lee: Supposing Mr. Tolman's testimony was contrary to the other. You have Mr. Levinson, Mr. Tenney, Mr. Stein and my own testimony, and the only benefit my testimony is that I have been in the thing.

Mr. Gilbert: Mr. Lee, please—we did not have an opportunity to ask Mr. Levinson anything about that; please do not refer to anything that he is supposed to have said.

The Court: You do not need his testimony. The Court is personally familiar with the cases in which 33⅓ per cent has been approved in a contingent fee, in cases where there was a large recovery. I mentioned one of them, Larson vs. Wrigley, and in that case the Court awarded 33⅓ per cent, which was paid.

Mr. Langworthy: I hope I may have a word to say on that subject.

Mr. Lee: There is just one thing that I want to say about Major Tolman. I think a great deal of Major Tolman. I

have a considerable admiration for him. I think he was in error in one thing, unconsciously. I have heard a great many men of prominence attack our President for a mistake he made 2 years ago or so, they don't mean to be un- [fol. 530] fair, but they are looking back; if he could have had the knowledge that we have now—if I could have had the knowledge that we have now of the events since 1929 I know my judgment would have been a good deal better than it was, and I thought it was pretty fair then, to my sorrow, but men are attacking the President for the thing that the best brains of the country could not anticipate.

Mr. Healy saw the defect of Major Tolman's position in a moment, you might say. He says, "You are looking back through the long end of the barrel." Let us see what he said. He said:

"Well, I understand there are 241 days of Mr. Lee's time, according to his statement, and for a gentleman of the professional attainments and standing of Mr. Lee, I should think that if he had a client who would pay him a retainer, and pay him cash, win or lose, he ought to get $200 a day for his work in a matter of this sort. In view of the risk and the uncertainty of compensation, and the contingent character of the case, I think he is entitled to double that amount for himself alone."

But, if the Court please, that is not a contingent fee. What is contingent fee? Of course, when we are looking [fol. 531] back and know there is 1,300,000, and know that a certain number of days have been expended, why, the whole meaning of the word "contingent fee" evaporates. "Contingent fee" means a fee that is fixed by the parties when they are peering into the future. That is what I did here. He is taking the past. You say a certain number of days—here is this cash; I am going to say a contingent fee, but he is just fixing the contingent fee looking through the thing from the present point of view, from the event after it has transpired.

Mr. Tenney was correct in saying you have got to look into the thing from the point of view of a contingent fee, knowing that when the thing started the parties did not know one way or the other what would transpire.

So, I thought that there is the vice of Major Tolman's testimony, given with the utmost good faith, but it is impossible for a man not to do that.

The Court: Of course, the word "contingent fee" as used in this contract, is a little ambiguous. Ordinarily, a contingent fee is a fee which is fixed by contract between the parties in advance of the performance of the services. The [fol. 532] parties agree on a percentage of the recovery as a fee.

Now, there could hardly be any standard as to what is reasonable in the absence of a meeting of the minds of the parties on the exact percentage. The only thing the courts do in a case of that kind is to say that a fee beyond a certain amount would be an extortion or unreasonable. Now, within the limits of what is reasonable the parties may agree upon anything.

As I understand the word "contingent" in this contract, and I may be wrong about it, means that the court, the United States District Court, which has been designated as a tribunal which is to assess this fee, in arriving at a conclusion as to what is a reasonable fee for the services which have been rendered, and about which the parties have entered into a contract, is to take into consideration the fact, as an element, that there was to be no fee unless there was a recovery in the case.

Mr. Lee: Yes.

The Court: It carries with it, by implication, the agreement that a larger fee is to be fixed by the Court, and would be fixed on a per diem basis.

Mr. Lee: That is all. I would agree with that, if the Court please. The only thing I emphasis is this: I think [fol. 533] the Court in doing that will attempt to place himself in the position in which the parties were when they started.

The Court: That is the duty of the Court in giving consideration to the element that the solicitor would have received nothing if he had lost the case.

Mr. Lee: I agree with that. I am saying this I don't want counsel to say that we did not bring it up Mr. Healy will go into this agreement that was made. First, we had a conference with Mr. Pepys, Mr. Gilbert, Mr. Carter and Mr. McConnell. Mr. Carter and Mr. Gilbert agreed at that conference it did not make any difference to them. Mr. Pepys said that all things considered he thought a fee of 20 per cent was reasonable. Mr. Factor objected, and it is entirely proper for counsel it was the second meeting

when Mr. Carter made the observation. And this is interesting. After we finally got together it was Mr. Pepys that sent out word to all these people that he is going to settle this on a contingent basis, that is, with the Court fixing it on a contingent basis, and says, "I am going to estimate 20 per cent," and figures out their share, what they will get, because the person ultimately says, "What am I going to get?" "You will get about 25 per cent." [fol. 534] Mr. Pepys does that and here we have 99.5 per cent of the people, with that knowledge, coming in and approving this thing. They are willing to take 25 per cent, and glad to get it. I could have made a contract over there for 50 per cent if I had wanted to. It would have been easy. These people had thrown up the sponge. They had not done anything. This money that is coming to them is just like so much velvet, as it were.

There is the situation and there is all I cared to say in the matter, if the Court please.

There is one thing that I did want to say, however. There has been a little feeling here, and I want to say something on behalf of Mr. Factor, and that is his regard for his mother. I have seen that, and I have said a good many things about him, but I have noted that fact. I did not want the mother not to come in here. Wasn't it an odd thing, I was waiting for her to come. One little incident occurred over in the Judge's chambers over there that I commented upon, and that has created some bitterness, but I wanted his mother to come here because I knew or believed that when she took the stand that she would tell [fol. 535] the facts, and I had her statements, so I knew what the facts were, but I did not mean to attack her and I did not object to those affidavits being presented before his Honor Judge Woodward because I was ready to go into the hearing.

So, I do want to say that little word on behalf of Mr. Factor, and if I said anything against his mother, I want to withdraw it.

Mr. Langworthy: If your Honor please, I think that I ought, in the beginning, to correct myself with your Honor about the proposition of law I spoke about at the beginning. I don't understand the terms of Mr. Lee's employment ex-

actly. I did not understand that he was originally employed on a contingent basis. Therefore, the principle of law that applies is that your Honor has the duty to take into consideration the element of risk in fixing the fee. That I concede. I want to correct myself, get myself right with the Court on that. I have already notified Mr. Lee and Mr. Healy about that.

Now, first, I would like to call your attention to the character of the plaintiffs in this case. I want to be perfectly fair about it. It is in the evidence. There are a great many people who are absolutely dependent, a large number of poor, helpless people; that this case involves the sav [fol. 536] ings which they have succeeded in accumulating by a life long diligent effort, and upon which they are dependent for the scant [illegible] and necessary during their declining years. Many of these persons have been left in destitution, and most of them have no means sufficient to employ legal counsel.

Now, that is in the record and it has been emphasized by Mr. Lee and I wish to emphasize it and I am quoting Mr. Lee when I read those words for you.

I want to call your attention to the wording of the settlement agreement. "The attorney's fees of Mr. Lee shall, after hearing, be fixed and allowed by this court; the attorney's fees to be so fixed and determined by the Court shall be fixed upon the basis that the services have been rendered on a contingent basis, and the attorney's fees are to include, upon proper proof thereof, such legal services as have been rendered to Mr. Lee, and which Mr. Lee has obligated himself to pay."

Now, therefore, under the terms of the contract any services that are to be included in this decree are services that have been rendered to Mr. Lee in this case. That means in this case, your Honor. And, inasmuch as Mr. Lee excludes any services rendered by Mr. Overmyer to be taken into [fol. 537] consideration, that is out.

Now, I want to call your attention to the fact that Mr. Lee had testified that he was originally employed over the telephone from London, and the understanding was that he was not to be paid unless there was a fund recovered, and in Pepys' Exhibit 1, his employment, which is his employment on behalf of some 875 interveners—Mr. Perry

corrects me the intervener states in the contract of employment:

"I am not to be liable in any event to make any contribution out of my pocket towards the costs and charges of the above proceeding, or any of them, other than a contribution of a penny on a pound on my claim, which amounts to so many pounds; that you will look for remuneration for your services only to any funds as may be recovered in such proceeding; that out of any funds to be recovered in this proceeding you are to be paid in respect of your remuneration the sum or sums which may be allowed by the court to the plaintiffs in such proceedings as attorney's fee, that is, you are to be paid such sums as shall be allowed by the [fol. 538] court for his attorney's fees, or which the court may think a reasonable fee for your services, taking into consideration the services so rendered and the funds recovered, and that I will not make any settlement of my claim without your consent."

Now, let us get back to the facts. Now, moreover that is the contract, your Honor moreover, the settlement agreement, in the letter explaining the settlement agreement, each one of these people who have consented to this settlement were notified that these fees were going to be fixed by this court.

It is true they were notified that Mr. Lee would ask for 20 per cent or more, and they were notified that they would probably be fixed on a percentage basis, and Mr. Lee testifies that he criticized Mr. Pepys for making that statement, because it was not accurate, and this is Mr. Lee's testimony here. He said that he asked Mr. Pepys about that. Why did he put it that way? And Pepys said they would not understand "contingent basis" and that is why "I put it that way because that will make them understand it."

Am I right about it?

Mr. Lee: Yes, they said they did not have a contingent. [fol. 539] basis and so they put it that way.

Mr. Langworthy: Now, the fact that these plaintiffs and interveners have approved this settlement with that language in there should not influence your Honor to give Mr. Lee 20 per cent unless he is otherwise entitled to 20 per cent. Now, Mr. Lee says, he brings forward Sol Levinson as a witness and Sidney Stein, or one of the Steins as a

witness, who are estimable gentlemen, but I say that is unfair. They were trying to make a settlement, a settlement of Mr. Lee's claims here, and a settlement of all the claims that the British Government had, of a civil nature, against Factor on behalf of the Broad Street Press, which, I understand, is some 600,000 pounds. And, before Mr. Lee got into the settlement matter Mr. Levinson, it appears here in the evidence, had offered 242,000 pounds. It also appears from the evidence that the negotiations for the settlement continued from that time up to the time that Mr. Lee's — until it was finally concluded by Mr. Carter and Mr. Gilbert with Mr. Lee. And while it does appear that Mr. Lee was conferred with here in Chicago on some occasions, from the correspondence offered in evidence, it does appear that Mr. Pepys and his associates and his organization had a great deal to do with the effecting of this settle-
[fol. 540] ment, and I say it is not right for your honor to be led astray in thinking that all of the credit in connection with this settlement is due to Mr. Lee.

Now, I don't wish, however, to detract unfairly from anything that Mr. Lee has done. My clients recognize that he has rendered valuable services, and that he is entitled to be paid a reasonable and proper remuneration for his services, and that in fixing that amount your Honor must take into consideration the fact that if he had not succeeded he was not to get anything.

But, I say it is unfair to bring forth a sales talk that Mr. Pepys did not understand, this sales talk as evidence of the value of Lee's services. "Why, here is a fund tied up over here, here is a long litigation; these plaintiffs have got a lot of claims ——"

The Court (Interposing): Aside from the Overmyer fee and this there isn't much difference between the testimony.

Mr. Langworthy: There is quite a good deal of testimony.

The Court: He says Mr. Lee should have at least $100,000; he said Mr. McConnell should have $10,000, he says that he has not arrived at any conclusion as to how much Mr. Wordsworth is worth. Now, assuming, as I under-
[fol. 541] stand Mr. Lee's testimony, he gets 42 per cent of this, he has to give 8 per cent to McConnell—isn't that so?

Mr. Lee: Yes.

Mr. Langworthy: He gives 4 per cent of his 50.

The Court: So that on those percentages, if his contract with Mr. Wordsworth was fair, there would be between 40 and 50 thousand dollars Wordsworth would be entitled to. You are not very far off; there would be $182,000, which is $262,000 less 30 per cent, only a difference of $20,000 and $30,000.

Mr. Langworthy: I would like to have you consider this. I want to read from two or three cases on this subject, but we are not confronted here with the amount of money that Mr. Lee is going to get, exclusively. We are concerned here with the value of the services that Mr. Lee has rendered, and the value of the services of the other attorneys that have been rendered in this case, and for which Mr. Lee has obligated himself to pay. That is another matter.

May I just read. I am not going to burden you with reading a lot of authorities, but I want to read this case of United States vs. Equitable Trust, 283 U. S. 738.

[fol. 542] This was a suit, if your Honor please, brought originally by the next friend for an Indian who was, perhaps, a moron, and he has parted with his money and he was incapable of hiring his attorney, and under the circumstances his attorney could not be, or attorneys, could not be paid unless they were successful. It is the principle, it is, in principle, our case.

The Court: That is the Supreme Court of the United States?

Mr. Langworthy: The Supreme Court of the United States. I am going to read a little from it and then I will read from the Court of Appeals in one other case, and that is all.

"The court later on, pursuant to a reservation in the decree, took up the question of what, if any, allowances should be made for services and disbursements. Applications for such allowances were made by the attorneys for the defendants, by the next friend and by his attorneys. All were opposed by the United States. The court rejected the application of the attorneys for the defendants and by a supplemental decree allowed to the next friend $7,500 for his services and allowed to his attorneys $184,881.06 for their services and $4,282.93 to reimburse them for out-of-pocket [fol. 543] expenses. There were also directions that these allowances be paid out of the fund which had been the sub-

ject of the litigation and that the fund as thus reduced be restored to the custody of the Secretary of the Interior conformably to the prior decree. On an appeal by the United States the Circuit Court of Appeals reduced the allowances for the services of the attorneys for the next friend to $100,000 and sustained the other allowances. This Court then granted a petition by the United States for a further review on a writ of certiorari."

So much for the facts.

"We come then to the question whether the allowances were excessive. Counsel for the United States now confine their criticism to the one for the attorneys' services.

"The District Court apparently included some services in other litigation, particularly in Oklahoma. But the Circuit Court of Appeals excluded them, and we think its action was right. The nature of the other litigation was such that it would neither disturb the prosecution of this suit nor affect the outcome.

[fol. 544] "While the Circuit Court of Appeals reduced the allowance to $100,000, it stated that $50,000 would have been enough but for the hazard. We think the hazard was small and that the allowance should have been $50,000. The material facts were few and demonstrable; and the applicable legal principles were fairly certain. Of course, there was need for intelligent research and action; but otherwise there was not much hazard. While the record shows that these attorneys did their part well, it also shows that, after the intervention of the United States, the attorneys of the latter contributed much helpful service. The fund which was recovered was large, and of course this had a bearing on what was reasonable, but it gave no license to go further.

"The fund belonged to an Indian who was mentally incompetent. He had no voice in selecting the attorneys and could have none in fixing their fees. Thus, justice to him required that special care be taken to confine the fees to what was reasonable. And by applying that standard, justice would also be done to the attorneys.

"As before indicated, we think the allowance of $100,000 [fol. 545] unreasonably high and that to bring it within the standard of reasonableness it should be reduced to $50,000.

"The supplemental decree is modified accordingly and as so modified is affirmed."

I want to turn to this same case in the Court of Appeals. I will only read part of it. It was a long litigation and there were depositions and investigations. This is in the 31 Fed. (2d) 916.

"The cause came on for trial in November, 1926, and consumed 7 days; it was decided in favor of Barnett a year later, the decree directing the defendant trust company to restore the funds which then amounted to nearly $700,000 to the Secretary of the Interior"

The Court: What was the Indian's interest, what was the character of the suit?

Mr. Langworthy: The fund was a fund that had accumulated in the hands of the Secretary of the Interior as royalties from an oil lease on the Indian's land, and he had been persuaded to transfer this fund, this amount of money, to a missionary society, or something of that kind.

Mr. Healy: The fund was still in the possession of the government?

[fol. 546] Mr. Langworthy: No, it was not. The suit restored the fund to the government. The fund was away.

The Court: But the question, as I remember the case, was one of the capacity of the grantor?

Mr. Langworthy: Yes.

The Court: To transfer; a single question of his mental capacity.

Mr. Langworthy: There were some other questions, but it was. John W. Davis was in this case.

The Court: He represented the government?

Mr. Langworthy: No.

The Court: He got the $100,000?

Mr. Langworthy: No, I suppose he got a part of the fifty. He was in the case in the United States Supreme Court.

"The allowance depends in part upon the amount at stake. Between February 1, 1923, when the gift was made, and November 21, 1927, when the decree was entered, the income falling due under the bonds was less than $140,000, though by how much we do not know, as the market value of the bonds was in some instances above par. Of this Barnett during this period was entitled to about $96,000, regardless of the result, and the total amount involved was [fol. 547] therefore substantially less than $600,000. If there be a rule in the District Court that in such cases al-

lowances shall be made upon a basis of one-third of the amount involved, we do not know it and we disapprove it; it certainly has never had our sanction. We do not mean, of course, that a percentage basis is in itself improper; but it cannot be fixed at the same rate for all cases regardless of the amount. The allowance is a payment for legal services, not a speculative interest in a lawsuit. It does not appear whether the District Judge included the Oklahoma litigation with the rest, though we should have expected him to say that he did not, if that were so. Whether he did or not, we think the allowance plainly too large.

"It is argued that we should not disturb it, unless there has been an abuse of discretion. Perhaps so, but that phrase means no more than that we will not intervene, so long as we think that the amount is within permissible limits; if our conviction is definite that it is, we cannot properly abdicate our judgment. Had the result been cer- [fol. 548] tain, we should have thought $50,000 enough for the work involved, excluding the Oklahoma litigation. As the hazard was real, for the reasons we have given, we think that $100,000 might be allowed, but that appears to us the utmost that could be. It is idle to go into details; such matters are proverbially uncertain, and men will undoubtedly differ about them; but we think it of much importance that in cases of the kind the inducement shall be kept within limits.

"The allowance to Bailey we will not disturb."

The Court: Of course, in this case, it must be borne in mind that the petitioners here all had notice that the solicitor asked for 20 per cent or more, and that no one of them is here objecting.

Mr. Langworthy: If your Honor please, why ask that question? Here are poor helpless people and it is the duty of Mr. Pepys to employ somebody to present reasonable criticisms, and he is here objecting. Now, why ask that question?

The Court: Well, I beg your pardon.

Mr. Langworthy: I only have one other case, and I read [fol. 549] it in part, if your Honor please, because it states the matters much more forcibly than I can state them. This is the case of McMannomy vs. C. D. & V. R. R. Co., in 167 Illinois at page 497.

The Court: While we are on that subject, just what is there in this record as to the character of these claimants? I suppose some of them must be business men of reasonable standing on account of the amounts involved, as they appear on the record of this court, although certainly the record would not justify a sweeping statement that they are all paupers.

Mr. Langworthy: No, they are not all paupers. I did not make that statement. The statement I read was Mr. Lee's statement, quoted from Mr. Lee's statement in his argument in another part of this case. So as to be perfectly fair, Mr. Lee testified about the character of them on the stand. You heard him testify. He stated in his argument to you this morning the same thing, that they could not have gotten a cent if it had not been for him; they were in no position to employ counsel, and I am not misstating the facts when I stated them to your Honor, nor do I want to.

I assume that some of them, your Honor, would be able to employ counsel in view of the fact they had invested a [fol. 550] large amount of money, some of them. Now, Mr. Lee has said that your Honor must decide this on a percentage basis, and I want to get your Honor away from that point of view. There is nothing in this case that requires your Honor to decide, and I don't think it is your duty to decide, what the parties would have agreed upon as a fair percentage if they had made an agreement in the start, because that is not the case before your Honor.

The Court: I shall not decide it on that basis.

Mr. Langworthy: Now, may I read a few lines, quote a few lines from this one decision so that your Honor will know what there is in the case.

This was a suit that involved the attorney fees of Edwin Walker, and it was agreed between Walker and his clients that Walker should have 25 per cent of what might be recovered for his services that he rendered, and his disbursements, and the other parties interested would take the balance. There was $500,000 of first mortgage bonds of the Eastern Illinois Company that were recovered, and Walker received $127,000. This is a per curiam decision, and in this case Mr. Morgan and Mr. S. S. Gregory represented Mr. Edwin Walker.

[fol. 551] "On the hearing, attorneys were examined before the master, upon each side, as to the usual and customary charge for such legal services as were rendered. There is no fixed standard or price current for such services, and, as is usual upon questions resting in opinion and influenced by a variety of considerations, there was a very wide difference between the different witnesses. Their opinions varied from $25,000 to $150,000, and some of them seemed to think that Walker had done injustice to himself in not charging more than he did. Those who fixed the higher amounts generally gave estimates of what would be a fair charge or a fair and reasonable compensation. None of them had ever received such a fee, but some testified that they would not contract to do the work for $100,000. It is evident that their testimony was based rather upon what they thought just and proper than upon the usual and customary charge, which is the proper inquiry in such cases. (Reynolds v. McMillan, 63 Ill. 46.) While opinions are receivable and entitled to due weight, the courts are also well qualified to form an independent judgment on such ques-[fol. 552] tions, and it is their duty to do so. (Goodwillie v. Millimann, 56 Ill. 523.) It is to be remembered that such opinions come from members of the same profession, having an interest in the general subject; that they often rest largely upon vague and imaginative ideas as to the difficulty of the questions in the case, and mental anxiety engendered, the skill required and the responsibility involved, and that they are so flexible as to be easily swayed by personal regard and by the opinion and the wishes of the one making the charge. It is well known what standards of value are fixed for the services of judges of the Supreme Court of the United States and the courts of last resort in the several States, and while the great rewards of professional life are not to be regarded as wholly pecuniary, yet the great disparity between the salaries of the highest judicial officers and such estimates as were here given by some of the witnesses as to the value of these services is worthy of consideration. Such opinions do not represent the usual and customary charge or payment for such services as between parties competent to contract. It is the duty of the courts to see that due regard is given to the rights and interests of clients, and that their decrees do [fol. 553] not represent mere extravagant opinions of

friendly attorneys as to what would be just and proper in a given case.

"The evidence shows, what is matter of common knowledge with the courts and the profession of which Walker is an honored member, that he stands at the head of his profession as a corporation attorney, and that in character, learning and experience in the general practice of the law he stands in the front rank. But in this case there was no intricate or abstruse question calling for the exercise of great talents. The questions involved in the foreclosure were whether there had been a default in payment of interest, and whether there could be a foreclosure without the existence of the conditions authorizing it in the trust deed; and the decree was reversed in the Supreme Court of the United States only for the reason that the majority of the holders of bonds had not requested a foreclosure, as provided by the terms of the trust deed. A large amount, however, was involved, and a good deal of time and labor were required. This was especially true during the period from the filing of the bill until the property was turned over [fol. 554] to the purchaser. From that time until the hearing, which was from the spring of 1877 until October, 1881, there was comparatively little labor. Afterwards there was the rehearing in the fall of 1882 and the subsequent proceedings in the Federal court. But at no time was the whole of Walker's labor devoted to this suit. During all of the time that the services were being rendered he was local attorney in Chicago of the Chicago, Milwaukee and St. Paul Railroad Company, and attended to its business to such an extent that he received an annual salary of $5000 or $6000 for such services. He was also largely engaged all the time in the general practice of law, and tried important cases in the courts of Chicago and elsewhere, and in the Appellate Court of this State as well as this court. During the time that these services were mainly rendered, and when they involved the most labor, he was counsel for the receiver, and performed services for that officer worth $4800 per annum.

"It is said that but for Walker's services nothing at all would have been recovered, and that as he created the fund he should have a large share of it. So also the laborer in [fols. 555 & 556] the field, the workman in the shop, and every one who produces a result requiring skill or labor.

may say that but for him such result would not have been achieved; but he is not for that reason entitled to more than the reasonable value of his services. If a client has no lawyer he will very likely be defeated, but if a lawyer has no clients he will likely remain poor and unknown. Clients and rights of action are just as necessary as lawyers, and in this case the right of action of the Danville Company was the source of the amount realized. It was to get rid of that claim, which was embarrassing the Eastern Illinois company, depreciating its stock and bonds and interfering with its operations, that the bonds were delivered. If this argument for Walker is to be considered, the fact that appellant's claim is for building part of the road itself should not be overlooked in balancing equities.

"It is said a quarter of any amount realized should be deemed reasonable where the fee is contingent; and so it may be. A quarter or a larger proportion of a small judgment might be just, or it might be too little. There are [fols. 557 & 558] many cases where the whole recovery would not be a fair compensation for the attorney, and it is manifest that such a rule can furnish no fair or certain guide. It would not do to say that because there are many cases where the whole recovery would be but just compensation, such would be the rule in all cases. While there are opinions of what would be reasonable and proper which would justify the allowance made, the evidence of a less amount comports more nearly with our judgment of the usual charge and true value of the services rendered. The amount allowed is still regarded as a fortune among those who only get what they earn. The questions involved in the foreclosure were simple. The intervening petitions of creditors, so far as appears, involved nothing more than is usual in such cases, which is simply the auditing of accounts. Walker was largely engaged in other business, and there was nothing about the case, except the large amount involved, which lent to it any extraordinary feature. Without discussing the question further, we will say that we cannot feel justified in suffering the allowance of $85,000 [fol. 559] to stand for more than $50,000."

Mr. Walker was paid $25,000.00 by order of the Superior Court of this county, I think—I think the Superior Court of this county allowed him $85,000 and the Appellate Court affirmed it.

The Court: He got $80,000?

Mr. Langworthy: He got $50,000 on a recovery of $500,000.

The Court: He got $75,000 altogether?

Mr. Langworthy: No.

The Court: I thought you said he got, that they paid him $50,000 and $25,000?

Mr. Langworthy: He did get $125,000 but he had to pay back the $75,000. This was a creditor's bill.

The Court: He had to pay back $75,000? Didn't they recognize the contract?

Mr. Langworthy: The contingent contract, no, because the plaintiff in that case was a judgment creditor, and, of course, he was not bound by the contract. It was the funds of the corporation Walker received and disbursed and there was a trust so impressed upon them, the same as the trust in here impressed upon this fund.

If your Honor please, I want to emphasize the fact that [fol. 560] it was recognized by Mr. Lee that it was necessary for him in order to be successful to get the co operation and to get the active co operation of Mr. Pepys. That was recognized by him at the very beginning. It was just impossible for him to make anything out of this lawsuit for himself much less for his clients unless he could get Mr. Pepys' co-operation and Mr. Pepys to co-operate with him and furnish the means of obtaining the evidence and, in part, of furnishing the evidence, because Mr. Pepys was in possession of all the records of the Broad Street, Limited, the books and everything.

He went over there with that purpose in mind and accomplished it. I want to emphasize the fact that Mr. Pepys contributed a large amount of service and effort towards accomplishing the result that has been accomplished. I don't wish by emphasizing that to detract one iota from the value of the services of Mr. Lee of the important part that he played in this whole transaction. But, he has recognized that. He said that in his argument that he had to have the services of a man like Wordsworth over there. That is true, but he really had to have Wordsworth, that is what he really had to have. He had to have the records of the Broad Street Press to prove his case.

[fol. 561] If your Honor please, I have prepared two statements but I have not had a chance to correct them.

I would like to hand them up to your Honor. They are based on Major Tolman's testimony. Your Honor can eliminate the items of $570.07 in the statements. I think they are a fair interpretation of Mr. Tolman's testimony, and I therefore think that on his testimony—I don't know which ones you would adopt in interpreting his testimony, but Lee's services at $200 a day is $48,208.33. He added for retainer the difference between that and $50,000, and then he doubled it on account of the risk factor. Then he added $10,000 for McConnell's services which he based, I take it, on the fact as it appeared in the testimony that McConnell is paid $4,800 a year, and doubling that takes care of the overhead.

I made the two statements because I thought a correct interpretation would require that we add the $8,000 Mr. Lee would have to pay Mr. McConnell, and in the other one I left that out. I called the sum of that 80 per cent because 20 per cent is to go to Wordsworth's firm. We don't know just what they did, but we are going to assume that it is fair. I think that is a fair interpretation of Major Tolman's testimony, and I think that it is fairly [fol. 562] based upon the testimony. I have prepared a statement of what I think your Honor ought to allow, and if you will eliminate the items that equal $570.07—that should be eliminated because that $570.07 was taken care of in the out-of-pocket money that Mr. Lee tells me is being authorized to be paid. Am I right about that?

Mr. Lee: I was not listening.

Mr. Langworthy: Now, Mr. Lee testifies he was about 12 days in court, 10 days in Europe on the first trip, and we know he was 44 days in Europe on his second trip, and he was 8 days returning from Europe, all of which I assume at $200 a day, his own figure of the value of his services. It is true he said in valuing his services in a case of this kind he would ask for a retainer and a consideration of something more when the case was over. But, I think from what your Honor knows, and I am calling your Honor as a witness in the case that it would be a fair amount in this case to make those allowances.

The Court: I do know something about this.

Mr. Langworthy. I know you do.

The Court: The first thing that attracted my attention is, anyone that would go into a lawyer's office with a case, with a case like this and ask a lawyer to look into it, anyone who is incompetent, who had the knowledge of [fol. 563] equity practice requisite to go into this case, I don't believe you could get lawyer to look into it for less than $5,000, any lawyer whose judgment would be worth anything.

Mr. Langworthy: Perhaps that is right, but I am now dealing with what I think is fair and what has been accomplished. But, the contract was he took it in this contingent way that we speak of. I am allowing him for the balance of his 241¼ days—I have made it a quarter instead of one-twenty-fourth to make the figures easy—$150 a day based on his own testimony, on his own admission that perhaps for office work $150 a day is a fair fee.

The Court: Do you mean that if I now—well, I was trying to build the case up in another way. Suppose we adopt the extreme theory the other way and assume we have a creditor's committee, a group of men with claims aggregating five, six or seven million dollars against Factor growing out of his operations in England; suppose they all organized into a creditors' committee and had come over to employ a law firm to proceed against him to reach this money in the custody of the banks. Suppose they would go to Mr. Lee's office, Mr. Tenney's office, Mr. Tolman's office, and say, "We want to employ counsel to represent this committee in this matter." Suppose they [fol. 564] said, "We are not employing you on a contingent basis at all, we want to pay you for your services." How much do you suppose either one of those gentlemen would want as a retainer in the case before they made an investigation of the facts and law in order to arrive at an opinion as to whether it was possible to maintain a bill for the recovery of this money against the banks?

Maybe I should not put you on the witness stand, but that is running through my mind. They would ask, in the first place, a very substantial retainer. In the next plain, the head of the firm who handled the work and the members who did the work would be compensated on a per diem basis when they did the work, and they would render bills from time to time to their clients on that basis; there

would be quarterly bills rendered on the basis of time actually spent working up the case.

If they represented a creditors' committee in a matter involving five or six or seven million dollars, Major Tolman's estimate of $200 a day for the head of the firm for his work is very modest.

Mr. Langworthy: What? I beg your pardon?

The Court: I say, it is very modest. There are a good [fol. 565] many firms who would charge more.

Mr. Langworthy: Yes, there are firms, but we are not talking—I think your Honor——

The Court: I am talking about a creditors' committee.

Mr. Langworthy: Yes, I am talking about a creditors' committee.

The Court: In addition to that, if the result of the case was settlement or decree for a million, three hundred thousand dollars there would be something added at the end, even if the fee were estimated on a reasonable basis for the result of the case.

Mr. Langworthy: I think on the facts in this case, I don't think that is the question, that your Honor has a right as a Chancellor to assume a situation of something that might have happened. I take it if a creditors' committee had come over here, had gone to John P. Wilson's firm and employed them and had disclosed the facts that were evidently disclosed at the beginning of this case to John P. Wilson's firm, and disclosed the means by which those facts could be gathered and proven, a great deal less time would have been consumed, and the fees involved in that particular firm would have been not to exceed my figure here of $135,000.

I believe that absolutely. Now, while I know a man like [fol. 566] John P. Wilson, Sr., gets more than $200 a day, and there are men, a few at this bar who do get more than that—very few—still, $200 a day for court work, and there is no higher estimate here in the record, no higher estimate has been fixed by any lawyer on the stand than that, and when I asked Mr. Tenney what a lawyer ought to charge, of Mr. Lee's standing, he refuses to answer the question. He said that was not it.

Now, I have the greatest respect for Mr. Tenney. I know of the association between your Honor and Mr. Tenney of years ago, and I did speak to his son as to

whether it would be proper, on account of that fact, for me to ask Mr. Tenney to advise me here.

Mr. Lee: I object to that.

Mr. Langworthy: And I would have——

Mr. Healy (interposing): I object to that, it is unfair and unethical.

Mr. Langworthy: It is not.

Mr. Healy: It is unfair for you to cite to this Court a conversation between yourself and Henry Tenney.

Mr. Langworthy: Well, I will withdraw it. But I would have been glad to have called Mr. Tenney as my own witness, your Honor, if I had had an opportunity to consult [fol. 567] with him, and if I and he had concluded, after consultation, that it was the proper thing to do.

Mr. Lee: Didn't you tell me that you went to Mr. Tenney's office and were wanting to get Mr. Tenney, and I had seen Mr. Tenney first?

Mr. Langworthy: I did not tell you that I went to his office because I have not been there.

Mr. Lee: Didn't I tell you that if we could agree on two men to testify before the Court—I would agree.

Mr. Langworthy: Yes.

The Court (interposing): The association you refer to ceased long ago, 20 years ago.

Mr. Lee: I did not know that your Honor had ever been a partner of Mr. Tenney.

The Court: That terminated when I became United States District Attorney for the Northern District of Illinois, and a great many things have happened since then; Mr. Tenney has tried a large number of lawsuits and does not make the slightest difference.

Mr. Langworthy: His ability and character is as high as any lawyer at any bar anywhere. But, I say now, that Major Tolman—I did not intend to say anything about him, his record speaks for itself.

Now, I think what I have presented to you by way [fol. 568] of facts, and I have tried to present this in a concrete way as to amount—now, I have not been unfair in adding the 20 per cent on to the amount—I have figured the amount I arrived at was 80 per cent of the whole, so that the allowance to the English solicitors is 20 per cent, and I think $135,182.13 less the $570.07 would be a fair,

reasonable and customary allowance for the services of Mr. Lee and of Mr. McConnell and of the English solicitors.

I think that is all that your Honor can take into consideration and allow for. You certainly cannot make any allowance for services, in view of this record, for services rendered by Mr. Overmyer, because Mr. Lee disclaims any allowance for his services on the witness stand. He disclaims it. Of course, he does not say that he is not going to pay him, but the contract does not provide for the allowance of fees that he is going to pay to attorneys—it is to include allowances for sums that he has obligated himself to pay for services rendered to him in the case, and he says there are no services of Overmyer that were rendered to him in this case, and that he claims an allowance for.

Do I make myself clear?

The Court: Yes.

[fol. 569] Mr. Langworthy: Am I stating the facts about right?

The Court: Yes.

Mr. Langworthy: All right. Now, I don't want your Honor to think by any word that I have said, or by my attitude, that I incline, or that it is my client's wish that your Honor should arrive at any less sum than is a reasonable fair allowance for the services that you are allowing for in this case. I don't want my criticisms to be hostile in any way. My clients recognize the valuable assistance and the services of Mr. Lee and they don't want to violate their understanding with Mr. Lee that the criticisms that I have put forward shall not be hostile, but shall be reasonable criticisms, as I was instructed by the high court of justice in England, that the receiver should be represented at this hearing; that any opposition of Mr. Factor to the allowance of a fee might and probably would have the opposite effect from what it was intended to have; that somebody should appear to make no hostile attack, but all reasonable criticism, and in my zeal if I have exceeded that your Honor will overlook it.

Mr. Healy: If your Honor please, I shall be very brief in what I have to say in connection with the matters now before the Court.

Perhaps it is in order for me first to discuss very briefly [fol. 570] the two or three cases counsel cited. It seems to me this Equitable Trust Case, with which I am familiar, in

the 283 U. S. is an authority in support of the contentions we are making here.

In that case, if your Honor please, there was no very great question, no controversy with reference to the facts. This Indian had been adjudged an incompetent person by the Oklahoma courts and a guardian ad litem was appointed for him in 1912, and after that adjudication and after the guardian ad litem had been appointed and was acting in that capacity, the Indian was induced to sign a document of some sort as a result of which he surrendered or attempted to surrender to an adventuress, a woman he had married, his interest in the liberty bonds which had been in the possession of the Secretary of the Interior and the court, if your Honor please, allowed 10 per cent of the recovery in spite of the fact that the government intervened through the Attorney General and was of substantial aid in prosecuting the matter to a conclusion and, as the Supreme Court says, the facts were few and easily demonstrated. There was a record of incompetency in the Oklahoma court which of itself indicated that this instrument upon which these parties were claiming an interest in this [fol. 571] fund could not in the very nature of things be a valid instrument, and the hazard and the risk, as the Supreme Court says, was comparatively slight, and the attorney who represented the Indian had the assistance, without any charge against the fund, of the Attorney General of the United States who was acting on a salary basis; not only that, but the court said the fund belonged to an Indian who was mentally incompetent, he had no voice in the selecting of his attorneys and could have none in fixing the fees. Thus, justice would require special care should be taken to confine the fees to what was reasonable.

Now, we have a very different situation here, if your Honor please, and the question which the Court asked Mr. Langworthy, which in a curt sort of way—he did not intend any offense—but he rebuked the Court for asking what seems to me was entirely pertinent, was an entirely pertinent question under the facts in this case that none of the parties in interest have objected to the suggestion contained in the liquidator's letter that Mr. Lee was going to ask a 20 per cent, and counsel answered that by saying that these parties were all poor and helpless. That is not the record, if your Honor please.

The record here is some of these parties have a 25 per cent interest to the extent of a claim amounting to 50,000 [fol. 572] pounds, and if they were all poor and helpless, if they did not have a penny on earth, they could at least have filed with the liquidator their protest, or they could have written him a letter, or they could have communicated with him in person and have suggested that the 20 per cent fee Mr. Lee was going to ask this Court to allow was excessive. But, the record here is, if your Honor please, that not a single individual who is interested in it, in this fund, has objected or protested in any way. On the contrary, every person, so far as we can ascertain, with the exclusion of a comparatively small percentage, have expressly approved in writing the settlement agreement, and have filed with the liquidator their assent and consent to the allowance, in effect, of this fee.

Now, the other cases are not very different. I am not going to spend much time on them. In the Walker case, we know that was a simple foreclosure suit and the court allowed him $80,000 how much was involved in that, $500,000?

Mr. Langworthy: Yes, but the foreclosure involved millions of dollars.

Mr. Healy: We, who are familiar with foreclosure proceedings, know there is no very great question of law involved in a proceeding of that sort, that there are no intri- [fol. 573] cate facts. That was all admitted of record so far as that proceeding was concerned, and all Mr. Walker had to do was prove up in a formal way before the Master the bonds and the mortgage which he was seeking to foreclose, and he was allowed in that case a very substantial fee.

In that same connection, in conjunction with the testimony of Major Tolman, this occurs to me, that aside from all these questions of reasonableness of the Lee fee, aside from the question of its contingency and that sort of thing, that when you test the Tolman testimony by the rule of risk, or by the more acid test of fair play, you find that Major Tolman is allowing Mr. Lee for his compensation in the matter what the average lawyer of Mr. Lee's attainments at the Chicago bar could earn in a year by just simply devoting himself to the routine business that came into his office.

Now, let us see what Mr. Lee was doing at the inception of this matter. He was going into a grueling test. He knew that. We all know, as a matter of fact, and as a matter of human nature, when you institute a proceeding in court and predicate your right to recovery upon the charge of fraud, that there is bound to be bitterness and hatred, and it was a matter, if your Honor please, that he knew was [fol. 574] going to attract considerable public attention. So, that not only was he risking his fee, he was not only paying his office expenses during the period of time he was engaged in this case, but to a very considerable extent he was risking his professional standing. Clients do not come to lawyers who lose cases, if your Honor please, especially if the lost case is a matter of common public comment, if it is a case which invites the attention of our industrious journalistic friends of the press, and it does not do a lawyer any good to lose a case of that sort.

Now, what else? There was no obligation on the part of Mr. Lee at the outset of this matter, I mean, no obligation such as would exist between a lawyer and an old client, to undertake a hard, grueling test of this sort. These were 2,000 or 2,500 people on the other side with whom he was unacquainted, to whom he owed no obligation, who were contending or claiming that they had been defrauded out of something, and he was invited to undertake that matter on a purely professional basis, and he was risking, as I suggested, if your Honor please, not only the opportunity to earn a fee if he did not prevail, but he had to turn down other business, as he testified; he had to devote about 80 per cent of his time to this matter for a year and a half—[fol. 575] what would Major Tolman give him? It seems to me the Court will take into consideration without the necessity of proof that Mr. Lee had to maintain his organization throughout the year and four months, and Mr. Tolman would give him, if your Honor please, a net income, after he had assumed all these risks which the average lawyer of his attainments could easily earn without the necessity of interfering with all of his other professional business; without losing the family intimacy that even lawyers should have; without forgetting the social pleasures that a lawyer may indulge in from time to time by running away from his professional work for a half a day to play golf or something of that kind. Here was a case of complexity and

intricacy to an extent which seems to me, if your Honor please, is most unusual. The legal questions involved were hard and difficult to understand. It required an able, energetic and vigorous lawyer to sustain in court the soundness of his legal position.

[fol. 576] The facts were intricate. He was dealing with parties who were on the other side of the water. There was no one at hand to give him the information, and it necessitated trips abroad, and he had to delve into all these intricate complicated questions of fact, he had to search the books for the purpose of sustaining this very unique and novel legal proceeding, and it was a question of very grave doubt whether he could ultimately prevail.

The case from his point of view was full of pitfalls, the avenues of failure were many, if your Honor please, and as a result of almost continuous effort on his part, he finally brought this controversy in to the safe and untroubled waters of compromise, and secured for these persons, these twenty-two hundred or twenty five hundred persons, a very substantial sum of money.

Now, Major Tolman says, if your Honor please, that if at the outset the parties had been in a position to contract and I am hurrying along a twenty percent fee would have been reasonable, and not excessive. If the Court please, that, in effect, is what all of these parties have done. Let us assume that I am employed by some one to represent them on a contingent basis in litigation, the outcome of which is doubtful, and at the outset we do not establish the definite amount which I am to receive as a [fol. 577] result of a recovery.

As the litigation goes on, and it is still uncertain, the case has not been disposed of, many questions which might result ultimately in a defeat of my client's claim, I say to him, "Now, I think we should have an arrangement as a result of which you will agree to give me out of any recovery that we obtain a certain percentage of the recovery." Or I go to my client and I say, as Mr. Lee in effect said in this case, "We have been offered one million three hundred thousand dollars to adjust a settlement, and settle and compromise this litigation. Are you willing to accept it?" The client would say, "Well, how much are you going to charge me?" "Well, I am going to charge

you twenty percent of the recovery." "All right, we will settle it that way."

Now, if those facts were established in court, that, of course, would be a matter of contract, and the Court would enforce the payment of a twenty per cent part of the recovery to the lawyer. It is precisely, it seems to me, if your Honor please, what the parties did in this case, when this letter of July, 1932, was written by Mr. Pepys to all the persons who have an interest in this fund; and the interest of Mr. Pepys, of course, is simply that of a receiver, he [fol. 578] gets no part in the official distribution. He wrote this letter to all of the parties in interest, that in payment of Lee's fee, remuneration and disbursement, it would probably be fixed on a percentage basis, "and Mr. Lee informs me that he will ask for an allowance of twenty per cent or more of the above mentioned sum."

Then he goes on to say that in the event the compromise agreement is carried out along these lines that "You will get about twenty-five percent of your claim, five shillings on the pound, having already deducted out of the recovery a twenty percent charge on the part of Mr. Lee."

Now, these claimants, the persons who are interested in this fund, have this information before them. They have received a copy of this document, and they are asked to indicate whether or not they object to it, because in the concluding paragraph of the letter—and that is in large type—it states "as the agreement becomes null and void unless the necessary consents of the shareholders are received within a limited number of days, it is of the utmost importance that there should be no delay on the part of those who approve the proposed compromise." In response to that, 99½ percent of the litigants in this court have endorsed their approval on the document, and 96.7, I think, isn't it, Mr. Gilbert——

[fol. 579] Mr. Gilbert: .9.

Mr. Healy: .9; substantially ninety percent of the persons who are interested in the fund and who are not before this Court, but who will participate in the distribution in the liquidator's office, have endorsed their approval and their consent, and so I say, if your Honor please, that the question you asked Mr. Langworthy was a pertinent question, that no voice of protest, no objection is raised by the owners of this fund, and it is no answer to the Court's

question in that respect to say that the liquidator is here objecting.

Now, let's see what the situation was at the time when Mr. Lee made this arrangement. He suggested to the liquidator over there that a twenty percent fee would be a fair fee, and at that time the liquidator was apparently of the same opinion. Then Mr. Factor objected. Now, I can understand Factor's reason for objecting. He was not very friendly towards Lee, I assume, in view of the charges that were made in this proceeding, and it would be asking more of human nature than can be expected to ask him to acquiesce in any suggestion which Lee made which meant the payment of a substantial fee to him, so that Factor objected at that time, and that, if your Honor please, was the reason why the liquidator, as I understand it, did not and could not acquiesce in the request which Lee [fol. 580] was making for a twenty percent proportion of the recovery. And then, in order to carry out the compromise, in order to make the settlement, it was agreed that the matter should be submitted to your Honor for decision.

Mr. Langworthy: Didn't Mr. Lee's original agreement provide that the Court here would fix the fee for your client?

Mr. Healy: Yes.

Mr. Langworthy: Then how could the liquidator usurp and take that agreement away on behalf of all the people?

Mr. Healy: Why, with knowledge of the facts, with knowledge of what Mr. Lee had accomplished for the beneficiaries of the receivership, knowing the amount of the recovery, it would have been entirely proper for the liquidator to stand before this Court and say that, in his opinion, through his counsel, that a twenty percent part of the recovery would represent a fair and reasonable fee for the services which Mr. Lee had performed.

Mr. Langworthy: Yes, he had that opinion.

Mr. Healy: And he evidently had that opinion until after that objection was raised.

Mr. Langworthy: He had it because he was told that the courts were in the habit of allowing from thirty-three and [fol. 581] a third to fifty percent.

Mr. Healy: They have been in the habit of doing that.

Mr. Langworthy: Not of such amount as this.

Mr. Healy: Oh, yes, and I have cases here which indicate that, I have cases in the Supreme Court where they have approved a fifty percent fee.

Mr. Langworthy: So have I.

Mr. Healy: And we know that the Circuit Court of Appeals in this jurisdiction, in a rather recent case, indicated that a contingent fee of thirty three and a third to fifty percent was not unusual, but was a customary fee, and your own authorities support that proof. This equitable case, where they allowed ten per cent of the recovery, and where there was a divided responsibility, and where lawyers who did not receive any part of the fee aided in the recovery, is in support of our contention that a twenty percent fee is not unreasonable.

Major Tolman says it is, except, if your Honor please, as I suggested in my examination, and as Mr. Lee suggested this morning, Tolman is viewing this thing backward, it is hindsight with him, and he is basing it upon a condition which existed now, whereas, the testimony of Mr. Tenney, if your Honor please, is properly predicated upon the condition that existed at the time Mr. Lee undertook the employment.

[fol. 582] Mr. Langworthy: Well, Mr. Healy, wasn't that the agreement, that the Court should fix the fee out of hindsight, when Lee was employed?

Mr. Lee: Certainly not, no.

Mr. Healy: Oh, no.

Mr. Langworthy: Oh, yes. He was not to get any money unless he recovered, and when he recovered, then the Court was to fix the fee. Wasn't that by hindsight?

Mr. Healy: Yes, but you took the position at the outset that the Court would not even allow Mr. Lee the larger percent he asked in this matter.

Mr. Langworthy: Well, I have confessed my error, I have apologized to you and the Court. I don't think that ought to prejudice me, in the mind of the Court.

Mr. Healy: No, except this seems to me to be true, if your Honor please, if we may discuss what naturally arises from the situation here in Court. Mr. Langworthy is representing a foreign official with whom he has not been in personal contact, and he is bound by the strict letter of his instructions, whatever they may be. He has no discretion in the matter, he has no client with whom he can communicate on

the spot, he cannot suggest to the client that this, that, or the other arrangement should be a fair one, he is bound by ironclad instructions and he has necessarily—and I do not [fol. 583] criticize him for that—he has got to lean over backwards.

Now, let me suggest to the Court this additional matter. Your Honor asked last night, and I thought it was a very pertinent inquiry, to refer to the testimony of Mr. Tenney with reference to the Overmyer aspect of the matter. As I suggested very briefly to the Court, I am of the opinion that so far as Overmyer is concerned, that that is a matter which is wholly immaterial, except if your Honor would decide that the fund which is in controversy is before the Court, and you have jurisdiction of the subject matter, it may be that you have power to decide and determine how that fund shall be finally distributed and paid, and if the Court reaches that conclusion, I am surely not going to interpose any objection.

But it seems to me, so far as Overmyer is concerned, that that is entirely beside the question. It would be just as pertinent to say, on cross examination of Mr. Lee, "Well, now, you are seeking to recover a hundred thousand dollars here, and you are not going to get all of that, are you?" "Oh, no, I have got some partners." "How many have you got?" "Well, I have got three or four partners, and I share equally with them." "Well then, all you are going to get out of it for your services in the matter is twenty-five thousand dollars. The partners haven't done a [fol. 584] lick of work in the matter, and they are going to get twenty-five thousand dollars a piece. Or you pay your stenographer thirty dollars a week, and she has done a little work in this case, some letters have been dictated to her, and you have got to pay her, and her service was not of any very great benefit in bringing about this result."

It seems to me that is an inquiry that does not concern the issue before the Court, the question before the Court. It seems to me the question before the Court is the value of Mr. Lee's services, and I even go so far, if your Honor please, as to say that we are not concerned with the value of Mr. Wordsworth's services or Mr. McConnell's services. That whatever Wordsworth did, Lee did. Whatever McConnell did, Lee did. Whatever recovery there may be

here for legal services in this matter is a recovery on the part of Mr. Lee.

The Court: Well, that would be on the theory that the Court adopts a percentage basis for estimating the fee.

Mr. Healy: Oh, yes, your Honor would take into consideration of course in determining, either on a percentage basis or on the usual, reasonable and customary basis, the necessary number of associates that he had to have, perhaps.

[fol. 585] The Court: Of course, the allowance here will be made to Mr. Lee.

Mr. Healy: Yes, your Honor.

The Court: That will be a lump sum.

Mr. Healy: Yes.

Mr. Langworthy: You are not suggesting, Mr. Healy, that Mr.——

Mr. Healy: Just a moment. I am listening to the Court.

Mr. Langworthy: Excuse me.

Mr. Gilbert: May I address the Court? The Court here is doing two things. He is fixing the amount of Mr. Lee's fee, the total sum, and at the same time he is ordering a distribution of the fund placed in the hands of the Court.

Now, the Court has knowledge of this other thing.

The Court: I have not seen this proposed decree, and I have not followed the pleadings enough to know whether this entire fund, a million three hundred thousand dollars, is to be paid to the Court, and then divided; or is the remainder, after the fee is deducted, to be turned over directly to the liquidator?

Mr. Gilbert: The plan is this: The entire fund is placed in the hands of the Court. The Court then orders the first item, of this out-of-pocket expense, paid to Mr. Lee. He next orders a given amount paid to Mr. Lee for fees. He [fol. 586] next orders an amount paid to Tamplin Company for Faber. He next orders an amount paid to Tamplin & Company for Hayhurst. He orders the remainder of the one million three hundred thousand dollars paid to the official receiver, and the remainder in any funds in the bank paid to Rella Cohen Factor.

Now, the point I am trying to make is this, this has no relation to the value of Mr. Lee's services, because whatever is done with the Overmyer incident is not going to affect him in dollars and cents. But this Court is going

to order so much money paid to Mr. Lee for solicitors' fees here. This Court has knowledge of this contract.

The Court: I suppose the contract is in the record?

Mr. Gilbert: It has been introduced in evidence here. That's all. I don't need to pursue it any further.

The Court: Have you anything further?

Mr. Healy: Yes. And that view of the matter, it seems to me, all develops on cross examination, that Mr. Lee had agreed to give a part of his fee to somebody who had suggested this matter to him at the outset, who didn't do a thing, who was not entitled, perhaps, to a part of the fee on any possible construction of the matter, that that would be a matter with which the Court would have no concern. [fol. 587] The Court: I think, generally speaking, you are right.

Mr. Healy: As was said the other day, to do as you pleased.

The Court: He is quite right about it, as a general rule.

Mr. Healy: Yes.

The Court: In an ordinary case, if this were the ordinary case, of a lawyer and his partner, or of lawyers who were associated with him in the conduct of the case. But there is rather an extraordinary situation here. Mr. Overmyer is an attorney, he has represented the British Consul in one branch of this litigation. There is before the Court a contract under which he would receive, out of any conceivable amount in this case, a very large sum of money, almost a fortune in money.

Mr. Carter: As far as some of us are concerned, you can leave off the "almost".

The Court: I will say a fortune in money, in these days. And it comes out of this fund which is placed in the custody of the Court. The more I have thought about it, the more I have been impressed with the idea that there is some duty on the Court at least to this extent: That is to make sure that the payments which are made to Mr. Overmyer in this matter, in view of his representation of the British Crown in one branch of this litigation, should be made in such a way that the Court will know that it was [fol. 588] with the full approval of the British officers who have authority to speak on that subject.

Mr. Healy: Well, in answer to your Honor's suggestion last night, I am going to call your attention very briefly

to the testimony of Mr. Tenney on that aspect of the matter. He was asked:

"In arriving at the conclusion, Mr. Tenney, that under all the circumstances of this case a twenty per cent fee of the amount of the recovery is fair and reasonable, you gave consideration to the testimony given by Mr. Lee with reference to the arrangement he had with Mr. Wordsworth and Mr. McConnell?"

(Reading from the testimony of Mr. Tenney.)

Mr. Healy: Then Mr. Gilbert asked Mr. Tenney something along those lines, and asked him if he had read the contract between Mr. Lee and Mr. Overmyer and Mr. Wordsworth, and Mr. Tenney said he had, but he didn't think it made any difference in view of the class of the work.

"And I don't think the fact he was a prosecutor would affect my judgment. I have seen the contract, but that would not change my answer."

Then he was asked this question: (Reading further from Mr. Tenney's testimony.)

Now it seems to me, if your Honor please, that that is [fol. 589] the true basis upon which to rest this opinion.

Now, let me very briefly call your Honor's attention to two or three late cases. The first case I have here, a New York case, I think I will pass. There is a case in the 167th U. S., McCall vs. Willoughby, where there was a contract between the lawyer and the clients for fifty percent of the profits, damages and costs which might be recovered in an action, and the significance of that case, if your Honor please, is expressed in the language of Judge Shires, where the Supreme Court does not criticize a fee of that kind.

As your Honor so well suggested this morning, I think where a lawyer makes a contract with a client on a contingent basis for the particular percentage of the recovery, that it might in some instances be excessive and extortionate, and a contract which the Court would not enforce because of confidential relationship between the lawyer and the client. But Mr. Justice Shires said: (Reading from Call vs. Willoughby, 167 U. S.) And they allowed him in

that case fifty percent of the recovery, which the client had agreed to.

Now, there is a case in the 16 Federal, the second series, 363, Waugh, Administrator, against Q. & C. Company. That was in the neighboring circuit, I think. There the recovery was a twenty five percent recovery on a part of [fol. 590] the litigation, and fifty percent recovery under another clause of the contract. And the Court said: (Quoting from said authority.) That was in this circuit, if your Honor please, Judge Evans wrote the opinion of the Court.

Mr. Langworthy: What is that authority?

Mr. Healy: That is an authority in support of our contention for a reasonable fee.

Mr. Langworthy: This contract isn't for fifty percent.

Mr. Healy: No, but you take the position here, you read from a New York case in which they repudiate the right to contract with his client on a thirty three and a third per cent basis."

The next case, if your Honor please, is Frink against Metcomb, 60 Federal, 486. In that case there was a recovery of ninety thousand dollars. There were four counsel in the case. The clients had advanced two thousand dollars to a lawyer to apply on costs and disbursements, and there was some sort of an arrangement between the counsel and their clients that even if they did not prevail ultimately and recover, that some sort of an adjustment would be made as a result of which the attorneys would receive some compensation for their services, and the question came up before the Court for the purpose of determining how much the re- [fol. 591] covery should be.

The Court approved the testimony of the witnesses, who were the solicitors in the case. No experts were called in the case, except the men who had actually participated in the trial, and one of them testified: (Quoting from said authority.) Now, in that case there was no contract with the clients that they should pay one-third of the fee. I don't know which circuit that was. Do you remember, Mr. Lee? I think it is one of the neighboring circuits and the lawyers were allowed in that case one-third of the recovery, plus the amount of the disbursements.

Mr. Lee: What page is that?

Mr. Healy: 486. Now, the case of Glidden vs. Cowan, 123 Federal, 148. That is a Delaware case. This case is the sixth circuit, Justice Allerton, Severns and Richards. In that case the recovery was $186,000.00. There were a number of lawyers, and each lawyer proved up the specific services which he rendered, and made his contention for his own allowance, and the trial court allowed to the lawyers $51,982.00, or twenty eight percent of the sum recovered. There was no contract under which the fee had to be contingent upon success, but the Court said that that was a circumstance which should not be overlooked, and it was an evident reason why the compensation of counsel should be the [fol. 592] full and fair amount required for the services which brought about so favorable a result.

Glidden, one of the lawyers who, together with his three associates, was allowed $14,797.00, protested that the allowance was not sufficient, and the Circuit Court of Appeals in the 6th District increased his allowance to $20,000.00, so that the recovery there, where there was no contract, and where the question of the element of contingency was more or less uncertain, was in excess of thirty percent, and there was no such complexity of fact and law in that case as in the case at bar.

Now, I submit, if your Honor please, that the fee which Mr. Lee is asking here is a fair fee. He does not stand before the Court in any trading attitude. He suggested to the liquidator that the fair fee, in view of the settlement, was twenty percent, and while he was not bound to stand by that arrangement, after the liquidator said he could not accede to it, he still comes here in perfect good faith, and he is not trying to set a fee so high as to get the Court to hit off on a middle ground, and divide the differences between the parties, and I think, if your Honor please, that when the Tolman testimony is construed in the light of conditions [fol. 593] which existed at the time the contract was made, and when his opinion is predicated upon a condition upon which it should have been based, that you will find no substantial difference between his and Horace Tenney's testimony. Major Tolman is my very good friend, I have the highest respect for him. In fact, in 1888, he was good enough to say that I was qualified for admission to the bar, one of the gravest blunders, perhaps, that he has made

in his professional life. But the major, if your Honor please, for I was going to say the major part of his life, has been specializing in municipal court law, and he has not had the wide experience in chancery matters that Horace Tenney has had and John Lee has had.

Mr. Langworthy: The Municipal Court?

Mr. Healy: Municipal law, municipal investments; not Municipal Court, no. But he is a specialist, and in the big litigation in which he was involved, the traction litigation, unfortunately for him, he was, as the Court is unfortunately in these matters, on a salary basis, and rendered no doubt in that matter services which were largely in excess of the remuneration which he received.

But where a lawyer, as in this case, takes a case upon the basis which Mr. Lee took it, risking his fee, his time [fol. 594] and to some extent his professional standing, he should be generously and liberally treated, and I think the liquidator in this case could very properly stand before this Court and recommend the allowance that he asks for, except, as I realize of course, Mr. Langworthy, with the instructions he has from Dr. Clark, who is the present counsel for the liquidator, may not accede to all the conditions.

[fol. 595] The Court: Does that complete the argument? Have you a copy of the contract, the settlement contract?

Mr. Langworthy: I have.

Mr. Lee: Are you speaking of the contract?

The Court: The settlement contract.

Mr. Carter: The settlement contract? It is in this printed copy here.

The Court: Well, let's have that.

Mr. Carter: That is on file here in the bank's counterclaim, that is an exhibit in that.

The Court: I want to be sure I have the document. As long as we have run past the adjournment hour, let's adjourn until Monday morning. There are certain papers I want to look over during that time. This is the settlement contract. Have you a copy of the Overmyer contract?

Mr. Carter: Mr. Langworthy has it.

Mr. Langworthy: That settlement agreement appears on page 43.

Mr. Carter: Yes, he has it marked there.

The Court: It is marked there, I have that with your computations here, Mr. Langworthy.

Mr. Carter: We have some findings of fact, set up in type.

Mr. Kearns: In draft type, your Honor. We might [fol. 596] leave a copy of that with you.

The Court: Perhaps it would be just as well for me not to say anything about the case until Monday. There are one or two matters I want to give just a little further consideration before I make a final announcement. I will be able to decide it Monday, I am sure. I want to satisfy myself.

Mr. Healy: I think all counsel will join with me in expressing to your Honor our gratitude for coming down and giving us so much time on this day when you ought not perhaps to be here.

Mr. Gilbert: Your Honor, I heartily join in that.

The Court: The findings of fact with reference to the attorneys' fees are in there, also?

Mr. Gilbert: They are in there in blank.

Mr. Kearns: In blank.

Mr. Langworthy: And those are the exhibits, the contracts between Mr. Lee and his clients.

The Court: Now, is this a copy of that letter?

Mr. Langworthy: That is a copy of the letter of Pepys to the stockholders, and the form of their reply, your Honor, so that you can get the picture. May I thank your Honor for your courtesy and patience in listening to my argument today?

The Court: It is always a pleasure for the Court to have [fol. 597] a case presented as expeditiously and ably as this case has been presented on all sides.

Mr. Healy: We have no advantage over the Court in that respect. He too has kissed the blarney stone.

The Court: There are some things I have to state about the case which I may not have time to say on Monday, when I decide it. I think perhaps a short analysis may be proper. There isn't any question that this is a case in which there are many difficulties, and, summing up the case, it was an intricate case, it was hard fought at the outset, and counsel who represented these security holders was met at the

threshold by an array of authorities against his action in a court of chancery, in a matter of this kind. It took a great deal of skill on the part of counsel to differentiate. It was a hard bill to draw, it was a hard situation out of which to devise a theory on which jurisdiction in equity could be predicated.

Counsel in this case was astute enough, in my opinion at least, to get the component points, and to differentiate his case from very many cases which were cited against him in the argument. It was a case, more so I think than any case which has come under my observation since I have been on the bench, where it might be said that the fund [fol. 598] which is being distributed is really created by the ability of the lawyer to devise a theory of a lawsuit, because if the jurisdiction of chancery had not been sustained, and each of these claimants had been relegated to a separate action at law, the claimants would have been without redress, there is not a doubt about that, because the amounts involved were not sufficient to justify the expense of a contested lawsuit, and I think the attorneys who have testified here have taken that into consideration.

I agree with one of the statements made here that after all there is not very much difference between Mr. Tenney and Mr. Tolman.

I would decide the case this morning if it were not for the fact that I want to give some thought and consideration to the matter which I mentioned this morning. I have this impression: There is a fund here to be distributed. This is a court of equity, and a court of equity, with reference to the distribution of a fund brought into its custody has the broadest power. And I am inclined to the view - I am not stating it finally—but I am inclined to the view that equity here requires that there should be a present allowance to Mr. Lee, and that in connection with that allowance he should be directed not to pay any portion of it to Mr. [fol. 599] Overmyer; that the Court should retain under its control a sufficient amount to compensate Mr. Overmyer on the basis of his contract, if the Court should determine in the end he is entitled to receive the money.

I think in a case involving distribution of money for services which are rendered in litigation pending before the Court, where the money is paid out of any fund over

which the Court has control, the Court has very broad powers.

Mr. Gilbert: There is no question about that at all.

The Court: I don't think that can be gainsaid. I think it is the duty of the Court in this case, in view of what is disclosed by this record, to give Mr. Overmyer the opportunity—

Mr. Gilbert: If he wishes.

The Court (continuing): —to present to the Court——

Mr. Gilbert: If he wishes.

The Court: Give him the opportunity to present to the Court the basis for his claim for the amount of money which he claims. If it does not go to him, it will go to the claimants.

Mr. Healy: Mr. Lee will claim no part of that.

Mr. Lee: No, no part of it.

The Court: No part of it at all. The allowance made [fol. 600] to Mr. Lee will be a present allowance, and it will have in mind that out of it he is to compensate Mr. Wordsworth and Mr. McConnell, it will take that into consideration.

If I reach the conclusion that the Court does have that broad power about the distribution of the fund, I feel constrained to adopt that course in this case. The only reason I would not adopt it would be after I satisfy myself, on reflection, that the Court has not that power. Eleven o'clock Monday.

Mr. Gilbert: Because we considered with the bank attorneys the mechanics of such a thing, in the event your Honor should reach that conclusion, I would like to call your Honor's attention to the fact — the decree provides for a lump allowance to Mr. Lee, and a very short provision could be made for Mr. Lee to return a certain sum to the Court.

The Court: We can attend to that.

Mr. Kearns: There are considerable mechanics left. We can determine that.

Mr. Healy: I don't think it ought to go into Mr. Lee's possession, because I think, if it does, the Court would lose jurisdiction.

The Court: No. I shall make an allowance here to Mr. Lee, and to Mr. Wordsworth and Mr. McConnel, I think I

[fol. 601] have that power, in view of the fact the fund is in the custody of the Court. I shall retain a sufficient amount so that Mr. Overmyer will be compensated on the basis of his contract, if the Court reaches the conclusion it should go to him; and I may say now I am inclined to the view that the approximate amount that should be allowed Mr. Lee presently would be between one hundred and eighty and one hundred and ninety thousand dollars. That is excluding Mr. Overmyer's compensation. I have not arrived at the precise figures, but I have estimated on this basis: I have estimated it on the basis of twenty per cent, deducting from that Mr. Overmyer's thirty per cent, and allowing enough compensation to take care of Mr. McConnell, on the basis of which it has been generally understood he was to be compensated.

I don't know what those precise figures will be, but I will announce it Monday.

(Whereupon the further hearing of the above entitled matter was continued until 11:00 o'clock A. M., Monday, September 26, A. D. 1932.)

[fol. 602]

FABER

v.

FOREMAN et al.

Before Judge Wilkerson

September 26, 1932, at 11 o'clock a. m.

Met pursuant to adjournment.

Present: Mr. Carter, Mr. Gilbert, Mr. Langworthy, Mr. Lee, Mr. Perry, Mr. Overmyer, Mr. Healy, Mr. Kearns, Mr. Foster, Mr. Fletcher.

The Court: Judge Fletcher; did you have something to say?

Mr. Fletcher: Yes, if your Honor please.

Mr. Langworthy: If your Honor please, perhaps I should apologize to the Court for one thing in my argument, which was in response to your Honor's question you suggested that none of the parties here were objecting to an allow-

[fol. 603] ance of 20 per cent, and I think I replied to that by suggesting to the Court that that question was not a proper one to consider. I should have said, your Honor, that they are not here objecting, except as——

The Court (interposing): Oh, that was perfectly all right.

Mr. Langworthy (continuing): If they did object, they would object to Mr. Wordsworth, or at least, through whom they employed Mr. Lee, and he would undoubtedly refer them to Mr. Pepys, who would undoubtedly refer them to the contract, and state that all reasonable criticism on the application would be presented to the Court.

In any event, I don't wish to add anything further on that subject.

The Court: Did you have something to say, Judge?

Mr. Fletcher: Just this, your Honor: I don't know whether I want to say anything or not, exactly, but I stated to your Honor in a little pencil note, in which——

The Court: Yes, I had the note.

Mr. Fletcher (continuing): I took the liberty of saying that I would like to say a word on behalf of Mr. Overmyer, if it seemed that there was any ruling to be made by your Honor this morning which would control the final decree, [fol. 604] which would be adverse to Mr. Overmyer's interest.

The Court: I never had anything of that kind——

Mr. Fletcher (interposing): I happened to see the transcript of your remarks Saturday afternoon. That is about all I know about it, at which time I understood that you indicated that this morning, as soon as the matter could be reached, you were going to make a final decision as to the amount of the fee.

The Court: Yes.

Mr. Fletcher: And possibly an order might be entered to turn over to Mr. Lee and other counsel in the case such fee as your Honor decided to be proper, but leave the amount which, under the contract between Mr. Lee and Mr. Overmyer, leave that amount in court for some purpose.

It was that aspect of the matter that challenged our attention, and on which I want to be heard, if your Honor thought that that would be the proper kind of order to make.

In other words, I represent Mr. Overmyer largely as a matter of friendship rather than as counsel by reason of his having studied law in our office, and all that sort of thing, and I did hope that your Honor would reach the con- [fol. 605] clusion that any amount that you decide upon would be paid to counsel of record and let the matter go at that so that Mr. Lee and Mr. Overmyer could be free to carry out their contract and make such arrangements in a matter which seems to us is not properly before the Court.

Your Honor also indicated in your observations made Saturday that some question might arise in your mind as to whether Mr. Overmyer, who is an officer of the Court, of course, was privileged to take any part in this civil litigation by reason of his having been engaged in the criminal litigation which dealt with the extradition feature of the case, and also whether the British authorities were aware of the fact he was in the civil case and would be remunerated directly or indirectly in some way by reason of that.

We are prepared to satisfy, I think, your Honor on those points at this time, and if an order is to be made here fixing the amount of the fee which shall be paid to counsel of record without special reference to Mr. Overmyer, I have nothing to say.

The Court: I don't know how the order which I have in mind to make in this case would be interpreted, but I shall be glad to hear from you if you desire to submit anything to the Court.

What is it, Mr. Langworthy?

[fol. 606] Mr. Langworthy: May I suggest that Canon's 13, 34 and 38 of the Canon's of professional ethics of the American Bar Association probably deal with the subject your Honor has in mind so far as the profession has undertaken to make a statement of it.

Canon 13 is "Contingent fees."

"Contingent Fees. Where sanctioned by law should be under the supervision of the Court in order that clients may be protected from unjust charges."

Also:

"Canon 34. No division of fees for legal services is proper except with another lawyer based upon a division of services or responsibility and each established custom of

sharing commission at a commonly accepted rate upon collections or commercial claims between forwarder and receiver, the one be a lawyer and the other is not, being a compensation for valuable services rendered by each, is not condemned hereby where it is not prohibited by statute."

And:

"Canon 38. A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his clients after full [fol. 607] disclosure."

That is all.

The Court: Are you acquainted, Judge Fletcher, with the record here? Of course, Mr. Overmyer's claim for fees here is not directly before the court?

Mr. Fletcher: No.

The Court: The application here was by the plaintiffs and intervenors for the fixing of solicitors' fees for the complainants and intervenors in this case, and evidence was introduced at the hearing as to, first, the nature and extent of the services which were rendered.

Second, certain letters and the so-called "settlement agreement," in which certain parties undertook to prescribe a standard which the court should follow in fixing the fees in this case.

Third, the testimony of certain experts as to the value of the services which were rendered. So that question which was before the court for decision was the allowance which was to be made upon account of the solicitor's fees.

Now, the parties to this so-called settlement agreement undertook to prescribe a standard with reference to the fixing of these fees, as to which the question arises concerning the right of the parties to make the agreement to bind these plaintiffs and intervenors on the subject of fixing [fol. 608] fees; and second, whether, if they had had the authority from the plaintiffs and intervenors to make any such standard which the court is required to follow in fixing the fees, the court would have been obliged to follow it where the fees are to be paid out of the fund which is under the control of this court.

Now, those questions are clear. They were argued by the parties who were before the court, and, if there are any additional facts or any additional argument to be submitted, the court will be pleased to receive them.

Otherwise, I shall feel constrained to decide the case on the record as it has been made.

Mr. Fletcher: As I understand the matter, your Honor, if I am not interrupting—

The Court: Go ahead.

Mr. Fletcher: The question came up here on the record, as you have explained it, on this contract made—

The Court: Yes.

Mr. Fletcher: Between the defendants and the plaintiffs, and others—

The Court: Yes.

Mr. Fletcher: Upon the testimony of experienced lawyers as to what would be a reasonable fee, and all that. With that part of it I certainly have no disposition, nor has Mr. [fol 609] Overmyer, any disposition to interfere.

The Court: The question which is now before the court is this: The counsel of record in this case is Mr. Lee—

Mr. Fletcher: That is right.

The Court (continuing): —there is this agreement; this agreement contains language which would indicate that the court was subject; or expected to fix a fee here on a percentage basis. The word, as used in the agreement, is "on a contingent basis". Now, there was no contract in this case between the plaintiffs and the intervenors with the attorney as to the percentage which was to be charged, and I suppose it does not require very much consideration for us to arrive at a conclusion that, when the duty is imposed upon the court to fix a fee, the court can not fix a fee on a percentage basis, there being no contract between the parties, the fee being fixed on a basis which has no relation to the services which were actually rendered by the lawyers. So that all that clause can mean, as I think I indicated last week during the argument, would be that the court has to take into consideration, in arriving at a conclusion as to the fee, which is to be paid out of this fund which is within the custody of the court, the fact that if there had been no recovery the lawyers would have received nothing; that that is an element to be considered, but then, in defer-

[fol. 610] mining but the contract in this case being made by the Public Liquidator of England, who is a general receiver of certain properties in England, not here involved, who stands in some kind of a definite relationship with the intervenors in this case, the precise nature of which is not made clear, and the attorney whose fee is to be fixed as against these clients, I say, it does not require very much consideration to arrive at a conclusion that, in fixing this fee, the duty is cast upon the court of looking into the nature and amount of services rendered.

These parties, if they had been contracting to pay a contingent at the outset of this litigation, might have agreed upon a fee of 15, 20 or 25 per cent, and the court might have recognized it, if it found that it was reasonable, but there having been no such agreement and the matter being before the court for the fixing of compensation to officers of this court for services which were rendered, the duty is cast upon the court necessarily to look into the kind of services which were rendered.

The court can not say that it would have been reasonable for these parties, if they had contracted for a contingent fund, to have fixed it at 10, 15, 20 or 25 per cent. I know of no such standard about fixing fees where the court is called upon to fix the fee, and, if there were any such standards, the parties who undertook to make this so called set [fol. 611] tlement agreement were not in a position where they could bind the plaintiffs and intervenors to the standard which the court was to follow in protecting their rights in paying this money out of a fund which had been created for their benefit.

Therefore, it became the duty of the court to look into the value of the services rendered by these individuals. Mr. Lee testified as to what he had done. There was evidence as to services which were rendered by the British solicitor, Mr. Wordsworth, in connection with the creation of this fund. He was not of record in this case, but he had performed services in connection with the creation of the fund, and the nature of those services were disclosed here in the record.

There was a third attorney, Mr. McConnell, who rendered services, and the nature of the services which had been performed by him were disclosed.

So, the court is in a position to make an allowance, giving effect to this contingent element to Mr. Lee for the services which had been rendered by himself and by Mr. Wordsworth and by Mr. McConnell.

The court had a definite basis in the record for the allowance on that account. It appears in the record here, however, that there were services, not in court here but in connection with the creation of this fund, which were rendered [fol. 612] by Mr. Overmyer. Now, the nature of those services are not before the court, and the court is unable to include in the allowance which is to be made here at the present time anything on account of the services rendered by Mr. Overmyer, because there is no basis in the record for any such allowance.

Now, this money being paid out of a fund which is under the custody of the court, and being paid to gentlemen who are officers of this court, I think it is the plain duty of the court to make clear here of record just what the nature and character of the services are for which this money is to be paid out, and that is the way the matter stands now.

What I indicated on Saturday was that I was then inclined to fix a sum which would be paid to Mr. Lee on account of the services rendered by himself and Mr. Wordsworth and Mr. McConnell, and to order that amount paid. There is in the record here a contract which was made with Mr. Overmeyer about services to be rendered by him in connection with the creation of this fund, and I was going to retain in the register of the court or in the hands of the trustee an amount sufficient to compensate Mr. Overmyer on the basis, in proportion to the allowance made by the court to the other attorneys for the services for which he would receive payment under this agreement with Mr. Lee, and to accord to Mr. Overmyer the opportunity [fol. 613] to make an application for the payment for his services in connection with the creation of the fund, and upon proper showing to make the proper order.

That is what I indicated I had in mind on Saturday.

I may say that I think that a court of equity would fall far short of the proper performance of its duty if it allowed any portion of the fund which is in its custody to go to the payment of solicitors' fees for services rendered in connection with the creation of the fund without requiring a

showing as to the extent and nature of the services. I think the court has that broad power in the control of this fund.

Now, that is all I want to say.

Mr. Fletcher: This strikes me, your Honor—Mr. Overmyer, of course, is not a party to this suit as counsel of record, and his rights depended entirely upon the contract between him and Mr. Lee. As your honor stated; at some time during the proceeding, it was perhaps not incumbent upon Mr. Overmyer to be in here, because he was not counsel of record. At the same time, the only thing I am concerned about is that no action shall be taken by your Honor which would result in Mr. Overmyer being denied the compensation which belongs to him under the contract with Mr. Lee, upon any assumption by your Honor that, in the exercise of your jurisdiction and power and authority [fol. 614] as Chancellor you can make some order which would adversely affect Mr. Overmyer's interests.

Now, I have no desire to go into the question of the amount of the fee. That has been adequately and competently argued and handled by counsel of great ability, who are directly interested. The only thing I am concerned about is, if your Honor has it in mind to reduce the amount of the fee or make it less by reason of the fact that no part of it should be paid to Mr. Overmyer under his contract with Mr. Lee for some reason which I confess I can not exactly comprehend, we would like to have a little opportunity to be heard.

This matter only came to our attention late Saturday afternoon; I mean, this particular aspect of the matter, this turn of the matter, which affects Mr. Overmyer so vitally and so directly. It has been our conception of the case that your Honor would hear, as you have just pointed out that you have heard, what was done in the case, what efforts counsel put forward, what was the result of the diligence and work required of counsel to create the fund and obtain this recovery, and would make an allowance based upon that to the counsel of record, and what counsel of record might do with that money under private contract would be a matter of no concern of the court.

The Court: Is it a concern of this court that officers of [fol. 615] this court, where money comes out of a fund created for the benefit of these parties, isn't it an element

which the court is bound to consider in arriving at a conclusion as to the amount of the fee to be allowed that 20 per cent of that fee was contracted to be paid to a lawyer as to whose work in connection with the creation of the fund there is absolutely no showing made to the court?

Now, put it any way you please, it certainly is a matter to be considered in fixing the amount of the fee which is to be now paid out of this fund.

Mr. Fletcher: You mean, paid to Mr. Lee? I don't want to interrogate your Honor, but——

The Court: That is all right. The fact that he contracted to pay 30 per cent of it to some lawyer, and neither one of them came here to make a showing as to what he did to earn the money, both being officers of the court——

Mr. Fletcher (interposing): Of course, if that is going to determine the amount allowed to Mr. Lee; if your Honor was to sit here and say, well, here is Mr. Overmyer, who has been rendering services, and here is Mr. Lee, who has been rendering services, and Mr. Wordsworth, who has rendered services, and Mr. McConnell, who has rendered services, since these plaintiffs have had the benefit of all these four men, I will make a larger allowance than I other-[fol. 616] wise would have done, that is one thing; but, if it appears that only one of those persons rendered any services, the amount would be smaller—if that is the attitude of your Honor, I haven't a word to say.

The Court: I do not see how there could be any other view. If we rejected the view, as I felt constrained in this case to do, that this fee can be fixed on a percentage basis by the court regardless of the services actually rendered by the lawyers, that the court should go back to the situation which existed at the time of the taking of this case, and try to determine what should have been written in a contingent fee contract, if one had been made—that simply can not be done in a court of equity at this time.

Mr. Fletcher: I quite agree with your Honor. Whether it is to be on a percentage basis or lump allowance is just a convenient method that your Honor will use to reach a conclusion as to what is fair and proper.

The Court: Now, when we come to the value of the services of the lawyer, we have this contract in which 20 per cent is to be paid to one lawyer and 30 per cent to another, and we have a showing made as to the services

rendered by one of the lawyers, and no showing as to the services rendered by the other, I think I am bound to take into consideration that, in arriving at the conclusion as to [fol. 617] the amount which is to be allowed here, but I had in mind, in my desire not to do any member of this bar an injustice, to leave the door open so that there could be a showing as to the services rendered by Mr. Overmyer. I had in mind to retain enough to compensate him on this proportionate basis which these lawyers had agreed upon among themselves, having in mind the allowance made to them, and to make allowance to him upon the showing, which would not be at the expense of the other lawyers in the case.

Mr. Fletcher: I did not suppose that your Honor would be called upon to make an allowance direct to Mr. Overmyer.

The Court: It would not be made to Mr. Overmyer, but would be an additional allowance to the solicitors in the case on account of the services rendered by Mr. Overmyer.

Mr. Fletcher: Will your Honor give us two or three minutes to confer, in the light of the statements made by the court?

The Court: I don't want you to misunderstand me, Judge, because what I tried to say here last week was in line of protecting Mr. Overmyer's interests.

Mr. Fletcher: I quite understand that.

The Court: But he was not before the court. I might have, well, on the record, said: They have made no showing on the part of Mr. Overmyer; here is a contract, he is to get 30 per cent of this, and there is no showing what he did to earn it, but I must take into consideration that in [fol. 618] arriving at the value of the services to be allowed to the other lawyers—I might have gone ahead and made an allowance here and thrown out this 30 per cent. But, I was not inclined to do that.

Mr. Fletcher: I think perhaps it would be unwise for me to agree to anything until I have had an opportunity to discuss this with Mr. Lee, who is interested, whose interests, of course, are bound up vitally with Mr. Overmyer's in this matter.

For that reason, I would like your Honor's indulgence a minute of two.

The Court: Yes; you may come back at 2 o'clock, if you desire.

Mr. Fletcher: Yes; thank you.

(Whereupon the above-entitled matter was adjourned to 2 o'clock of the same day.)

[fol. 619]

FABER

v.

FOREMAN, et al.

Before Judge Wilkerson

September 26, 1932, at 2 o'clock p. m.

Met pursuant to adjournment.

Present: Mr. Fletcher, Mr. Foster, Mr. Carter, Mr. Kearns, Mr. Langworthy, Mr. McConnell, Mr. Perry, Mr. Overmyer, Mr. Gilbert, Mr. Lee, Mr. Healy.

The Court: Yes, Mr. Healy.

Mr. Healy: If your Honor please, there is one feature of this matter which, it seems to me, has not been called to the Court's attention. Mr. Lee testified, your Honor will remember from the record, and if I mistake the record in any respect, since I am depending upon my recol-

[fol. 620]

lection, I hope that counsel will correct me.

But, at any rate, he testified that after he filed the original bill of complaint in this case he had a conversation with the British consul, and subsequently with Mr. Overmyer, and after that, I think, Judge Petit, a member of Mr. Overmyer's firm, and there was a discussion at that time about the division of the fee, but no arrangement was made of any sort, no agreement, tentative or otherwise.

Then, Mr. Lee secured from Mr. Overmyer this letter of introduction to the British solicitor, Mr. Wordsworth, and went abroad, I think in July, 1931, and in his discussion of the matter with Mr. Wordsworth the suggestion was made, either by Mr. Lee or by Mr. Wordsworth, that there should be some fair division of the fee, and Mr. Lee said to Mr. Wordsworth on that occasion that if he would aid in the prosecution of this suit and co-operate with Mr. Lee for the purpose of creating the fund which has finally

been created, Mr. Lee says, "I am willing to pay you and Mr. Overmyer 50 per cent of the fee which may be allowed me." And Mr. Wordsworth suggested that that was very fair, and Mr. Lee said, "Now, you take that up with Mr. Overmyer and adjust it in any way you gentlemen see fit."

[fol. 621] Now, I assume, if your Honor please, if Mr. Lee had gone over and said to Mr. Wordsworth that I will give you 50 per cent of my fee—and that was developed on the hearing before your Honor—that your Honor would not now have the question that has arisen in the case.

The Court: I am not sure; I think we would have had a different question.

Mr. Healy: Yes, your Honor might have said that Mr. Lee was very generous.

The Court: The question of determining what would be a fair, reasonable fee in the case, the acts of the lawyers themselves are elements which the Court is obliged to take into consideration, their own estimate of the value of their services and the way they treated it. Then the question would be, upon the record, whether Mr. Wordsworth had earned, let us say, approximately what he would receive as a result of that arrangement with Mr. Lee.

Mr. Healy: It would seem to me, if your Honor please, the question here is the value of Mr. Lee's services. I have argued that and I am going to argue it again.

The Court: It is just a little bit in the way you put it. I think you should put it as a bald proposition, but in arriving at the conclusion of the value of his services, there are a great many elements to be considered, and the case, [fol. 622] in my opinion, would have been a little different if there was a showing as to the nature and amount of services rendered by this lawyer who is to get, if this 20 per cent contingent fee is allowed, a little less than $80,000.

Mr. Healy: Let me follow that proof just a little further so that your Honor will have it in mind, that is all. I am not going to argue it.

Then, Mr. Lee came back to Chicago and had a talk with Mr. Overmyer, according to his testimony, and told him the result of his talk with Mr. Wordsworth. It was then suggested by Mr. Overmyer, as I remember the testimony, that the 50 per cent fee Mr. Lee had suggested in London should be divided on the basis of 35 per cent to

Mr. Overmyer and 15 per cent to Mr. Wordsworth. I think Mr. Lee demurred to that and said that he thought that Mr. Wordsworth ought to have a larger part of the fee and Mr. Overmyer then said he would be willing to divide it on the basis of 30 and 20.

Mr. Lee then called Mr. Wordsworth on the telephone. I don't remember whether—he testified that he called him on the telephone—when was that, Mr. Lee?

Mr. Lee: That same day.

[fol. 623] Mr. Gilbert: I think the record is silent on that point.

Mr. Healy: At any rate, he communicated with Mr. Wordsworth very promptly and told him what Mr. Overmyer said, and Mr. Wordsworth said it was satisfactory to him. It was that feature of the situation, that element of the proof that I wanted to get in your Honor's mind

The Court: Yes, I had in mind that agreement was assented to by Mr. Wordsworth; yes, I had that in mind.

Mr. Fletcher: Now, if your Honor please, I wonder if you would permit me to make a statement. I hope that I will not be over 10 minutes. I wanted to make a statement with reference to Mr. Overmyer position here. Of course, he is not in court, you understand, technically. I am only doing it at the grace and favor of the Court; it is only by the favor of the Court that I am allowed to say it at all.

The Court: Of course, there is no order which I could make here that will bind him.

Mr. Fletcher: No, not directly, not directly. Mr. Overmyer had, heretofore, until the proceedings of Saturday, proceeded upon the theory that there was no occasion for him to come in here and ask to be allowed to intervene nor appear in these proceedings at all. He relied, or course, so [fol. 624] far as his part of the fee was concerned, upon his contract with Mr. Lee. He took it for granted——

The Court (interposing): And Mr. Wordsworth.

Mr. Fletcher: Yes, Mr. Wordsworth; there were three parties to it, Mr. Wordsworth, Mr. Lee and himself.

The Court: That is my recollection

Mr. Fletcher: His understanding was it was the function of the Court, under the agreement, or perhaps in the discharge of the Court's duty as a Chancellor, since this fund was being administered by the Court to determine the reasonable fee, and that the only thing your Honor would

consider would be what was a reasonable fee for the services rendered by him, by these gentlemen, taking into consideration the character of the litigation, the difficulty of preparing it, the amount of time and effort they would have to put in taking the depositions; the fact it was contingent; the fact that through their diligence they had disclosed this fund to a very considerable extent and brought it to the attention of the Court, and all these things, and that thereupon your Honor would simply make an allowance as to the proper amount of fees to be paid counsel of record, and that he would deal with Mr. Lee, being the perfectly honorable gentleman that he is, on the question of carrying [fol. 625] out the contract.

If that had been the course of the matter there would have been no occasion for any friend of Mr. Overmyer's to interpose, but it so happened as a result of things over which Mr. Overmyer had no control, and of which, for that matter, he is not complaining, that this contract was called to the attention of the Court by Mr. Langworthy representing the shareholders here in this particular feature, as I understand it.

Now, I have no criticism of Mr. Langworthy for that. He discharged his duty to his client, as he saw it. But, when it came to your Honor's attention, apparently your Honor's attention was challenged by the fact that a certain portion of this compensation to be awarded Mr. Lee was to go to Mr. Overmyer, and, as you said this morning, you were concerned, of course, with what services had been rendered by Mr. Overmyer.

The Court: Naturally, when you find lawyers getting $80,000 for helping to create the fund, the Chancellor would like to know what he did do to help create it for the purpose of arriving at a conclusion as to what is a fair fee to be awarded Mr. Lee.

Mr. Fletcher: That is all right, your Honor, even if I [fol. 626] did not fully understand the implication of the Court, individually, I would not quarrel with that contention at all, for the moment at least.

Now, Mr. Overmyer, I am advised—your Honor stated this morning, in substance, and if I misstate it I do not do it intentionally, that this record did not indicate any services rendered by Mr. Overmyer, none substantially.

Now, I haven't had the pleasure nor the opportunity to read that record.

The Court: If I said that I perhaps should have been a little more guarded in the language which I used. I would say it did not show definitely enough the services of Mr. Overmyer to warrant taking that element into consideration in arriving at a conclusion as to fee.

Mr. Fletcher: If your Honor please, I have talked with Mr. Lee, and he has very candidly but very hurriedly in the short time we had, gone over just what the record shows in that respect. I shall not undertake to discuss it in great detail, but it amounts substantially to this, that Mr. Overmyer was the attorney, as we all know, of the British consul in the matter of the extradition proceedings, which is what I will call, for the sake of brevity, the criminal case, because whether it is technically so or not, I need not be concerned with, but I will call it that to distin-[fol. 627] guish it from this case. But, he was the attorney for the British consul in reference to that case, and in the course of his conduct of that case, with which your Honor has nothing to do, of course, it came to his attention that there was this fund which might be possibly available for the shareholders if they could make certain proof about the funds. I don't mean to assert that he alone originated the idea about this fund, because Mr. Lee apparently through resources which were open to him, about which there can be no suggestion of criticism, also discovered the presence of the fund, acting I suppose, entirely independently.

Now, it was recognized by Mr. Lee, I take it, that Mr. Overmyer here was representing the liquidator in Great Britain. He has continued to represent him, so far as I know, and so far as I believe, and upon the special point which your Honor mentioned Saturday, which may or may not seem to you as significant, that you were not satisfied as to whether the British consular and ambassadorial authorities understood that Mr. Overmyer was engaged in this civil suit and would expect to be compensated, we are prepared to exhibit to your Honor a letter which puts that question at rest, if this is the proper time to do it, [fol. 628] or if it still lingers in your Honor's mind as a reason for scrutinizing the question of the disposition of this fee.

The Court: I think, regardless of that fact, I—I will say that I think now is not the time to go into the letter.

Mr. Fletcher: Very well. I want to say this, we are able to show here, and get at it shortly and I think to your Honor's complete satisfaction, that the Consul General in New York and the consul here in Chicago and the Embassy in Washington were aware of the fact that Mr. Overmyer was engaged in this civil litigation in one form or another, and they were pleased about that fact, and glad to have their interests represented.

Now, if your Honor please, another question might arise here that I would like to mention in connection with what I understand was a statement made—a very proper one by Mr. Langworthy—and that is this, his interest was, his purpose was, to show here, to argue to the Court, to ask the Court not to compensate Mr. Overmyer for any services for which he was being compensated in the criminal case by the government of Great Britain. I have no quarrel with that statement, but we would be prepared to show, [fol. 629] if the occasion offered, that Mr. Overmyer will receive nothing by reason of any services in the civil case from the British government; that the English government does not control the civil litigation and the only interest the English government has is the diplomatic function to see that its subjects are given proper representation and proper council and have a chance to appear in the American courts to defend their rights. That is as far as it went, or could go.

There is no question of Mr. Overmyer receiving any compensation from the British government for any services rendered except in the extradition proceedings, and he looks to them for compensation and expects to get it. The two cases are entirely distinct and apart.

Now, your Honor, I am confronted with this difficulty: Mr. Overmyer is not in court. Mr. Overmyer believes nothing should be done to his prejudice until he has had an opportunity to be heard. I have no desire to hold up the litigation, the decree or payment of monies or disposition of these funds. Even if I had the power to do it I would not want to do it and I certainly have no such power. But, at the same time I am extremely anxious that no decree shall be entered here by this Court which will in any way prejudice Mr. Overmyer in his conduct and the nego-

[fol. 630] tiations with Mr. Lee with reference to their private contract.

Now, the question is, shall we ask for time in which to make a presentation of the services actually rendered by Mr. Overmyer. I am assured by perfectly reputable counsel in whose word I have great confidence that the record is complete upon that subject; that we could not strengthen or amplify the record in any respect. I don't want to hold the matter up, yet I have had no chance to see that record.

I will say this, if your Honor please, if your Honor enters a decree here fixing the amount of compensation that should be paid to Mr. Lee, based upon your understanding of this record, and stop there, without reference to impounding of any fund, or statement of Mr. Overmyer's connection with it at all, I don't see why I should have any reason to complain, because I am perfectly willing, so far as my client is concerned, to rest the question of the total amount of fees to be paid to Mr. Lee upon the record made and upon the argument of able counsel and your Honor's judicial ability.

And that, I think, is perhaps all I would feel warranted in saying at this time.

The Court: There was handed up to the Court on Saturday findings of fact and conclusions of law which are to [fol. 631] be entered in connection with the decree in this case. As I understand it, the only contested matter before the Court was the question of fees.

These findings of fact are agreed findings of fact, is that correct?

Mr. Gilbert: That is correct.

The Court: Do you understand that to be the situation, for Mr. Factor?

Mr. Gilbert: That is correct.

The Court: They are not based upon proof offered in open court, but they are findings to which all parties assent.

Mr. Kearns: If your Honor please, I believe they are based upon evidence introduced in open court, and likewise the parties agree that they are proper.

The Court: The point I should like to make, I should like to have an expression from all parties in open court as to whether, save for the question of fees, the findings which have been handed up to the Court are agreed to by the parties?

Mr. Lee: They are agreed to. I would have to inspect each one of these findings with a microscope before I would undertake to underwrite them; they are agreed to in a sense.

The Court: You are not objecting to them being entered by the Court?

[fol. 632] Mr. Lee: No.

Mr. Gilbert: We are agreeing.

The Court: I don't want to be put in the position of making findings which may not be supported by evidence which has been introduced before the Court. Of course, the Court will make findings, if the parties in open court agree that the facts as found are substantially correct.

Mr. Gilbert: That is agreed to all around. It is agreed to, isn't it, Mr. Langworthy?

Mr. Langworthy: I don't understand——

The Court: You are here on the question of fees?

Mr. Langworthy: Yes, that is my limit.

The Court: I am excepting the question of fees from the matter about which I am inquiring.

Mr. Gilbert: Mr. Lee has spoken for the plaintiffs and interveners, I am speaking for all the defendants except the minor defendants and except the banks. Mr. Kearns speaks for the banks.

Mr. Kearns: I am speaking for the banks, and the facts as outlined in these findings were proven in our formal proof the other morning.

Mr. Lee: I am not sure whether they were proven or not, but I do not take the position that I am questioning [fol. 633] them or objecting to them, to the findings. I was not listening to a part of the proof, as a matter of fact.

The Court: Now, on the question of fees, there were two plaintiffs in this case and a very large number of interveners.

In the letter which was sent out on the 26th of August, 1931, by the firm of which Mr. Wordsworth was a member, it was stated:

"Mr. Lee has devoted a great deal of time to the matter and has given it as his considered opinion that the proceedings are well-founded, and that there is a reasonable prospect of fair success. He has been good enough to

say that he would look for his remuneration only to any fund recovered."

In the document which the interveners signed relative to the authorization of counsel, it is stated that:

"Out of any funds to be recovered in such proceedings, you are to be paid in respect of your remuneration the sum or sums which may be allowed by the Court to the plaintiff in such proceedings, as attorney fees, or which the Court may think a reasonable fee for your services, taking into consideration the services so rendered and the fund re- [fol. 634] covered."

In the letter which was sent out by the senior official receiver, subsequent to the making of the agreement which has been called here a "settlement agreement," it was stated:

"In payment of Mr. Lee's remuneration and disbursements to be fixed by the Judge of said District Court (this remuneration is entirely within the discretion of the Court, it will probably be fixed on a percentage basis and Mr. Lee informs me that he will ask for an allowance of 20 per cent or more of the above mentioned sum, of approximately 360,000 pounds)."

In the agreement of July 19, 1932, which was executed by Mr. Pepys, senior official receiver, by the defendant Factor, by his attorney in fact, Mr. Wordsworth and Mr. Lee—it was an agreement with Mr. Factor for the settlement of these controversies by the payment of an amount aggregating, or amounts, aggregating a million, three hundred thousand dollars, and so far as the settlement with Mr. Factor is concerned, it appears that—at least, it is not questioned, that the parties who signed that agreement had power to act for both Mr. Factor and the claimants here.

However, the agreement went further. It undertook to [fol. 635] control a matter with which Mr. Factor, so far as dollars and cents is concerned, had no interest. Factor was paying a million, three hundred thousand dollars in settlement of these controversies described in the contract. However, there was injected into this agreement a provision with reference to the manner in which the fees to

be taken out of the fund created for the benefit of these claimants was to be determined. Now, that was a matter between the plaintiffs and interveners, on one side, and the attorneys on the other. It is a matter in which, obviously, the attorney could not represent himself and his clients, there having been no agreement made prior to that time on the subject of attorney fees.

There was in the letter which had been sent out this statement to the clients that 20 per cent would probably be asked for, but it was coupled with the statement that the entire matter was within the discretion of the Court.

Now, how far the senior official receiver was justified in speaking for all of these claimants on the subject of fees is not very clear. The senior official receiver was the receiver of certain properties in England. These claims had [fol. 636] been filed with him and while his views on that subject would naturally receive very serious consideration from the Court, I think it must be clear that these parties could not bind the Court as to the standard which was to be observed or the method which was to be followed in arriving at a conclusion as to the fees which were to be paid out of this fund which had been created and brought into the court.

The agreement contained this provision:

"The attorney fees of Mr. Lee shall, after hearing first had thereon, or as hereinbefore provided, shall be fixed and allowed to the claimants and interveners in said cause pending in the United States District Court for the Northern District of Illinois, and shall be charged only against the monies and securities mentioned in clause 1 hereof, and shall be paid to Mr. Lee as follows:

"Three-thirteenths thereof in notes and ten-thirteen-s thereof in cash, such attorney fees to include, upon proper proof thereof, such legal services as have been rendered to Mr. Lee and which Mr. Lee has obligated himself to pay. The provision herein that attorney fees are to be allowed [fol. 637] to plaintiffs and interveners instead of to Mr. Lee direct shall not affect the right of anyone to object and to be heard thereon by the Court as to the amount of said attorney fees, and said decree of the Court hereinbefore and hereinafter mentioned shall contain the provisions of

this clause as to the payment of attorney fees. The attorney fees to be so fixed and determined by the Court shall be fixed upon the basis that services have been rendered upon a contingent basis,"

and so forth.

Now, Mr. Pepys was not the receiver of the funds involved in this suit. He was the reciever of certain companies in England, and stood in a certain relation to some of the claimants in this case, the precise nature of which it is not necessary to discuss. It is sufficient to say that the parties who executed this agreement were not in a position to bind the claimants as to the standard which the Court was to apply in allowing fees out of the funds under the control of the Court.

There was no contract between the claimants and counsel for a contingent fee. It seems to me that rating this provision as to the fixing of the fee upon the basis that [fol. 638] the services have been rendered on a contingent fee basis means no more than this: That the Court in arriving at a conclusion as to what is a fair and reasonable fee in the case shall take into consideration as one of the elements the fact that if the case had not been successfully conducted, the attorneys would have received no fee.

If it is contended it means that the Court shall fix a fee upon a percentage basis, it would be impossible for the Court to arrive at a conclusion as to the percentage which should be found. If parties in advance of litigation agree upon a fee on the basis of a percentage, that means that that fee is to be paid regardless of the amount of services required. It may be the case will be settled before it is brought to trial, maybe the case will be settled during the trial; it may be there will be two or three appeals to the courts of last resort, but the fee remains the same.

Now, in the absence of a definite agreement of that kind to which the client is a party, the Court cannot say, after the fund has been created and brought here, that a fee of five, ten, fifteen or twenty-five per cent is a reasonable fee. [fol. 639] It seems to me that the duty of the Court with reference to fixing the fee in this cause is precisely what it would have been if there had been no provision in this contract about it at all. The parties were not in a position to

change in any respect the plain duty of the Court in reference to the manner in which a fee or fees, which are to be paid out of a fund of this kind, are to be determined.

So, that in arriving at a conclusion as to what is a fair and reasonable fee in this case, it is necessary to take into consideration the nature and extent of the work performed by the attorneys in the case. The Court has endeavored to do that, taking into consideration the evidence as to the amount of work, the opinion of the experts who have testified, the estimates of the attorneys as to the proportions of the work done by each of them, as shown by the agreement among themselves, and the Court has tried to consider all of the circumstances which have been brought out in evidence in arriving at a conclusion as to what is a fair and reasonable fee for the work which has been done.

Now, in arriving at a conclusion the Court is, I think, obliged to take into consideration the fact that these claimants were advised that the attorney would probably ask for 20 per cent. The Court should take into consider- [fol. 640] ation the fact that there has been no objection except as the objection was made here by the representative of the ~~senior~~ British receiver, and it may be that the reason why no other objection has been made is that the parties considered that it would be the duty of the senior British official to protect them in this situation. In arriving at a conclusion as to the conclusion of the amount of a fee to be awarded here, there is one element which the Court cannot overlook, that is, that if this fee is fixed on a basis of 20 per cent of the recovery, nearly $80,000 of that amount would be turned over to an attorney as to whose services the showing here is not sufficiently definite or complete to warrant a finding as to the value of those services.

It may be said that the work of the attorneys whose services are proved is worth the full amount asked, and that it is no concern of this Court what they do with it. As a strict legal proposition that may be true. But, in determining whether the services are worth what is asked, the Court cannot overlook the fact that their own estimate of value is large enough to include what, upon the record, [fol. 641] is the compensation for another lawyer as to whose services there is that indefinite proof. The Court is of the opinion that the full amount which is asked cannot

be allowed without some further showing as to the value of services rendered by Mr. Overmyer.

Now, in that connection, I think I should say this: It is not merely services in court which are to be compensated for in these allowances; every one who has contributed in a proper way to the creation of the fund is entitled to have his services proved, and to have an allowance made somewhere or other on account of those services. The services of Mr. Overmyer which have been mentioned here at the hearing appears to have been services which were rendered outside of the court proceedings. They may have been of great value to these interveners, they may be services for which an allowance should be made, they may be services for which these interveners should compensate Mr. Overmyer. But, I do not think that the Court, merely because it is a court of equity as it is, dealing with the distribution of a fund which has been created here, and which is being administered as a trust fund, is powerless when it comes to requiring that even though there is this legal agreement between the attorneys as to the division [fol. 642] of fees, there shall be some showing that one who reaps the benefit of the distribution of a part of this fund has in some way contributed to its creation.

There is one more observation I would like to make. It may be that under the rules as they were applied a number of years ago it would be proper for the Court in a case of this kind to make an allowance of the fee in a lump sum, without any further finding. But, I think that where, as here, the questions have been raised as to the value of the services of different attorneys who have contributed to the creation of this fund, our new equity rules require that the Court should make findings of fact on that subject, and that would necessarily embrace a finding as to the value of the services of the different attorneys in the case.

I do not know that it would require the Court to differentiate in an allowance to a partner between the work done by different partners, but where, as here, there were three groups, so to speak, who were interested in the division of this fee, namely, Mr. Lee and his office associates, Mr. Wordsworth and his office associates, and Mr. Overmyer, I think the equity rules would require the Court to make a finding as to the value of the services of each of [fol. 643] those groups, and that properly where, par-

ticularly where the allowance, where the amount asked for has been challenged, and where the request has been made here on this subject as it has been made in argument by the solicitors for the British liquidator.

With that in mind I have tried to go over the record here and determine a finding which should be made as to the contributions by these different lawyers. I think that Mr. Lee has shown for himself in this case as to the services which he has rendered, he is entitled to at least $117,500.

I think the record here would justify a finding that the British consul in this case is entitled to a fee of at least $50,000.

I think that the record in this case would justify a finding as to Mr. McConnel that he is entitled to be paid out of this fund $15,500 more. That makes an aggregate of $183,000.

That finding does not include anything on account of the services of Mr. Overmyer. The Court upon the record as it now stands feels unable to make the finding on that subject. However, I am inclined to do what I said might be done last week, to reserve the difference between this $183,000 and 20 per cent of the amount, namely, $77,000, in the hands of the trustee—I see no reason why it should [fol. 644] be paid into the Court—that sum to be subject to the further order of the Court upon application by any party who may see fit to make the application, the Court retaining jurisdiction of the case solely for the purpose of determining whether that sum of $77,000 or any part of it shall be paid on account of solicitor fees in this case as to which sum additional showing may be made to the Court.

The findings of fact will have to be redrawn on the subject of attorney fees so as to cover the points which I have mentioned here, and the decree will have to be changed in that respect, and that may be done, and findings and decree may be submitted tomorrow or Wednesday, either one.

Mr. Carter: We could get it ready by tomorrow, couldn't we?

Mr. Gilbert: We can have it ready by tomorrow, if we could commence. May I suggest this, your Honor, also. The contract of settlement provides that of this fund of

$1,300,000, that the fees as awarded shall be paid to Mr. Lee.

The Court: Yes. I see no reason why that should not be done. The decree, the finding, will show the method which the Court has employed in arriving at the conclu-
[fol. 645] sion; I see no reason why, so far as Mr. McConnell and Mr. Wordsworth are concerned, that the whole matter should not be covered by one check, turned over to Mr. Lee, and the decree may so provide.

Mr. Carter: Yes.

Mr. Gilbert: I was going to suggest that if anything is retained under the jurisdiction of the Court to be later considered to be paid to the British subjects or to Mr. Overmyer, that the sum, ought, by reason of the terms of the contract, to be paid to Mr. Lee with directions that he pay it into the Court, and I have discussed it with Mr. Lee and with Mr. Healy and they agree with me it should be done in that form.

The Court: It may be done in that way if you agree on it.

Mr. Gilbert: For the record, I should like to have it shown that Mr. Franklin R. Overmyer has been present personally in court during the sessions of this date.

The Court: If these amounts which I have indicated here are not mathematically accurate—it is pretty hard in a case of this kind to indulge in exact mathematics—but they represent my judgment for all practical purposes.

Mr. Lee: May we consider this, if that balance of the
[fol. 646] money, $77,000, should be paid to me, and if Mr. Overmyer should sue me for his share of that money—the money might be paid back to the British various participants, but if it passes through my hands I might have to pay 30 per cent of that amount although I never received a cent of it. I would like to consider it.

The Court: Well, you may consider it. My own thought was to let the trustee keep it, and as Mr. Fletcher said this afternoon when the matter has been fully presented to the Court it may become very simple.

Mr. Gilbert: Are we to retain something in our decree or are we not, for the decision as to whether it goes to Overmyer or to the British subjects; are we to do that or are we not?

The Court: You are.

Mr. Carter: That is the $77,000?

The Court: Yes.

Mr Gilbert: Then would the Court be kind enough to indicate the time in which a claim for that should be presented?

The Court: The decree may fix that.

Mr. Gilbert: Twenty days?

The Court: Twenty days

[fol. 647] Mr. Kearns: May there be 20 days for a certificate of evidence of the proof that was introduced by the trustee in support of the counter-claim?

The Court: There may be, the decree may provide that also.

Mr. Lee: Mr. Healy made a further point, your Honor. I don't want to get in any dispute with such a splendid man as Mr. Wordsworth and if the intent of the Court is that the $50,000 should go to Mr. Wordsworth, and he would not be bound by the agreement, the net result might be I would have to pay Mr. Overmyer 30 per cent of what I get, plus 30 per cent of what Mr. Wordsworth got.

The Court: This amount will be paid to you. And while I am not your attorney I think you would be justified in holding out 30 per cent of that amount that goes to Mr. Wordsworth until the matter is finally settled about the Overmyer fee. I do not think you would be subject to the slightest criticism for doing that.

Mr. Healy: I think in the case of Mr. Wordsworth, his high——

The Court (interposing): You can send all but 30 per cent and hold the 30 per cent until you find out what will be done about this other matter.

Do you want to bring it in tomorrow or Wednesday?

[fol. 648] Mr. Gilbert: We will be pleased to bring it in tomorrow.

The Court: There is nothing for me to do but sign these documents.

Mr. Schwartz: Your Honor, I was charged by Mr. Lee with having received a million dollars, and I think the decree shows that I haven't any monies.

[fol. 649] Mr. Lee: The decree sets it out, if there is any question about it. If you insist upon my introducing evidence, I may do so. I thought the decree protected you.

Mr. Schwartz: You may introduce some evidence, if you have any; I would like to have you introduce it.

Mr. Lee: The decree passes upon that, if your Honor please.

Mr. Gilbert: What is this?

The Court: I don't know that there is anything before the court. I thought I was through with the case, except the reservation of jurisdiction solely for the purpose of determining what is to be done with the $77,000.

Mr. McConnell: If your Honor please, I would like to make a statement, if I may. There was a certain affidavit filed in this cause by me on information which I thought at the time accurately stated certain facts and the statement in that affidavit that Mr. Schwartz received a million dollars, I would like, on the record, to withdraw; not from a feeling of any compulsion in the matter, but simply that the record may be straight.

The Court: There is nothing on the docket about that. If you want to make the statement in open court, all right.

Mr. Gilbert: I think Mr. Lee wants to join in that, too.

Mr. Lee: I have no objection to that, surely. I am not [fol. 650] sure that we can be in tomorrow morning. This thing has various angles that deserve some consideration.

The Court: Come in Wednesday morning at 10 o'clock.

Mr. Gilbert: Unless we can come in tomorrow.

The Court: You may come in tomorrow, if you want to, otherwise, Wednesday.

(Thereupon the further hearing of the above-entitled cause was adjourned until Wednesday, September 28, 1932, at 10 o'clock a. m.)

[fol. 651]

FABER

vs.

FOREMAN

Before Judge Wilkerson

Wednesday, September 28, 1932—12:20 o'clock p. m.

Hearing resumed pursuant to continuance.

Counsel present: Mr. Gilbert, Mr. Butler, Mr. Carter, Mr. Lee, Mr. Kearns, Mr. Langworthy, Mr. Foster.

Mr. Carter: If your Honor please, we asked to see you a few minutes because of the situation that has arisen here this morning about this decree. I talked with Mr. Foster over the phone a few minutes ago, and suggested, after we had the message from Miss Ryder, that you were going to see us in open court here, that he come right over, and he said he would.

The Court: I announced this morning I would hear this at 10:00 o'clock tomorrow morning, Mr. Carter. My other plans are such that I felt I could not give you any time on this today. I have some other emergency matters. Of course, I have to arrange my own calendar and make my [fol. 652] own engagements, and make my own settings.

Mr. Carter: We appreciate that, your Honor, but the point is this: All the parties of record to this transaction have agreed on this decree, and had agreed on it last night. Now, I understand from Mr. Kearns that Mr. Overmyer was in his office at 8:30 this morning to see a draft of the decree. Mr. Kearns had made a suggestion, in response to a question by Mr. Foster, or somebody, that he would show him the courtesy of showing him the decree and the findings before they were presented, so that Mr. Overmyer had them at 8:30.

I don't know what time Mr. Gilbert will tell you, Mr. Foster called him up and asked the courtesy of having the matter go over from 10:00 o'clock, when we were all ready, until 2:00 o'clock today. The decrees are here, and we are ready to present them, and we were ready to present them at 10:00 o'clock.

The Court: Have you the findings?

Mr. Carter: Yes, the findings are there in that decree.

Mr. Gilbert: To put it another way, your Honor, there is not a party to this cause that wants to be heard. All we want is the agreed decree entered, that's all.

The Court: Where are the parts that were to be put in?

Mr. Carter: Where are the parts that were to be added?

The Court: Yes.

[fol. 653] Mr. Carter: I think, in the findings, the first place occurs on page 15. Mr. Kearns can tell you more about that, because he has worked out the details of it.

We are not attempting to adjudicate anything here as to Mr. Overmyer.

The Court: I was ready to hear you here at 10:00 o'clock this morning, I had the full morning here.

Mr. Carter: We were, too, but Mr. Gilbert is here to speak for himself. As I understand the conversation today with Mr. Foster, we didn't want to consent, and Mr. Foster got us to do it, and then came and spoke to your Honor without consulting us at all, and without reporting back to us. He tells me over the phone that he tried to get me as soon as he got back to his office, and tried to get Mr. Gilbert.

Mr. Gilbert and I did not leave Mr. Gilbert's office to come over here until twenty minutes ago, or thirty minutes ago, at the outside. We had not had any word, none of us had had any word, including Mr. Langworthy, who is on his way over here now, and Mr. Kearns, in his office, had had no word from them.

Mr. Gilbert: We were prepared to proceed, as your Honor suggested, at 10:00 o'clock this morning, and, out of courtesy to him, I agreed with him we would not come until 2:00 o'clock. Then, unbeknown to us, something else hap-
[fol. 654] pened.

Mr. Carter: I ought to state that both Mr. Gilbert and I called Miss Ryder; Mr. Gilbert called her before your Honor went on the bench, but she didn't have a chance to talk to your Honor about it. I called her a little later and talked to her about it, and offered to come over and speak to you about it in open court, and she said that I had probably better wait and let her speak to you about it when you came off the bench.

They certainly ought to be ready to take a position now one way or the other. There is Mr. Langworthy, and here is Mr. Foster now.

Mr. Kearns: I can point it out to your Honor, if you care to have me do so. The substantial changes are on page 15 of the findings.

The Court: I have read that.

Mr. Kearns: Then again at page 24 of the findings, the new paragraph 16 is substantially a transcript of your Honor's statements the other morning in connection with the services that have been rendered by Mr. Lee.

The Court: That is all right. I don't see any reason—I think that is substantially what I said, and I see no objection to its going in in that decree.

Mr. Foster: If the Court please, I am wondering, if before you pass upon this matter, you will recognize me for [fol. 655] just a moment, please?

The Court: Surely.

Mr. Foster: If the Court please, as you probably know, I am associated with Judge Fletcher.

The Court: Yes.

Mr. Foster: On behalf of Overmyer. This morning there was presented to us, through the courtesy of one of the counsel, a copy of these tentative findings and of the decree, and I then communicated with Mr. Lee. I am making this full statement because I bitterly resent some implications, I don't think counsel understood the facts, but I want to make this statement in open court right at this time, and I wish to supplement it then by a request that it be carried out in the manner I understood it was to be.

Early this morning I had a talk with Mr. Lee and with Mr. Gilbert, and I am not sure whether Mr. Kearns, I believe not; but the other two, in any event. And they were courteous enough to agree, as we thought we had a right to do, that this matter should not be taken up before 2:00 o'clock. We could hardly read these through, and we thought, whether we were in court or not, as a party, in view of what had been said and taken place here, that we should be accorded the privilege of coming in in that same capacity, and making suggestions.

[fol. 656] The Court: Well, the motion on the call for 10:00 o'clock this morning was continued until tomorrow morning at 10:00 o'clock because of my own engagements.

Mr. Foster: Exactly, but I wish to go just a trifle further, because I think these gentlemen really think that I in some manner was instrumental in bringing that about.

The Court: Counsel here had nothing whatever to do with continuing it until 10:00 o'clock.

Mr. Carter: Counsel stated to me over the phone this morning that he had notified every one of our offices as soon as he got back to his office, and that it occurred here about 11:00 o'clock, and I say that Mr. Gilbert and I never left Mr. Gilbert's office until a quarter to twelve, and we had received no message.

Mr. Foster: That is just exactly the kind of statement I bitterly resent, I don't care whether it comes from Mr. Carter, or who.

The Court: The motion was on the call here this morning. I had two contested matters, of which this was one. It was called by the clerk here, and then counsel stated that the parties would like to have it go over until 2:00 o'clock. I said it would be impossible for me to take it up at 2:00 o'clock, that I would take it up at 10:00 o'clock tomorrow morning. That's all that took place.

[fol. 657] Mr. Foster: I just wish to explain that, if your Honor please; not that I care what this counsel may do, but I want the rest of the counsel here to know how I even happened to be here.

At 10:00 o'clock this morning, after our talks with them, which they know about, I happened to be before Judge Barns on another matter, and was there until upwards of 11:00 o'clock.

The Court: Somebody had telephoned my secretary, and wanted this to go until 2:00 o'clock, and I couldn't take it up then.

Mr. Foster: About 11:00 o'clock I came into this court room, and Mr. Golding, this stenographer here, saw me, and he said, "Where are the parties in the Factor case."

I said, "They are coming in at 2:00 o'clock." He said, "I wish you would tell that to Mr. Sullivan." I stepped up here and informed Mr. Sullivan. He in turn told your Honor of it, and you beckoned me up to the bench and said, "You communicate with the parties, and tell them." I said, "Your Honor, I am perfectly willing to do that, but Judge Fletcher and I asked that this matter go over until 2:00 o'clock, and we don't want it to appear that we are asking it go over until 10:00 o'clock tomorrow morning."

[fol. 658] You said, "The Court has an engagement at 2:00 o'clock, you tell them this matter will go over until 10:00 o'clock."

Mr. Carter: I am not implying counsel did anything improper, except when he says he got back to his office shortly after 11:00 and notified all of us, and I checked up with counsel, and none of them received notice. But we are here, and we want the decree. That is the important thing.

Mr. Foster: Judge Fletcher at this moment has got Mr. Overmyer there, and is going over this, and we certainly desire to be heard, if the Court please, and, at the time

assigned, we will be here with perhaps a few suggestions which the Court may wish or wish not to listen to, and we certainly should be accorded that privilege. That is all I have to say, and I think that is due me from this counsel, at least, to make some statement about the implications which he made about what would appear on my part to be some connivance to get this matter put over. I resent it bitterly.

Mr. Lee: I don't think, if the Court please, there was ever in my mind any suggestion that counsel had done anything improper.

Mr. Foster: I phoned when I got back and talked to Mr. Healy.

[fol. 659] The Court: Now, let me ask you, is there any reason in the world why I shouldn't read this over? I want to be sure that it is embodied, but I want to put the decree in the findings of fact, because I did not follow the views of anybody with reference to the disposition of the case.

I accepted the argument of Mr. Langworthy, and along the line of Major Tolman's testimony, that this is not the kind of a case where the Court could fix a reasonable contingent fee on a percentage basis, but that it was necessary to inquire into the services rendered by the particular lawyer. But so far as making a separate finding as to the different groups of lawyers, and so on, that was my own thought as to the duty upon the Court in fixing a fee under these circumstances.

Now, I want to read this over and see — it is all right. I cannot see that any harm comes that Judge Fletcher should come in here tomorrow morning and hear him briefly. I should think it would be a courtesy that counsel would be glad to extend to a lawyer of standing at the bar.

Mr. Lee: I find by getting out a sharp pencil that if I should pay Mr. Overmyer the amount he claims for this work I would get about eighty-four thousand dollars. I am not criticizing anybody. The decree involves the judg-[fol. 660] ment of the Court in the matter.

The Court. Yes.

Mr. Lee: The Chicago papers have stated at various times that I was to receive as fees five hundred thousand dollars and later a hundred and ninety thousand dollars. In fact the amount I would get net out of this if I pay Mr. Overmyer the amount which he says I must pay him would

be just eighty-four thousand dollars, and for the amount of work I have done, I have learned a lesson, at any rate. I am not criticizing anybody.

Mr. Gilbert: If your Honor please, I am not going to say anything about going over until tomorrow morning, but I am going to say that this has been a bitterly contested law suit, it has tried the very fiber of all of us, we have worked days and nights, and we are here now with a decree that is agreed to by all of the parties to this cause, which embodies your Honor's views as well as ours, and I strenuously wish to object now to any one interposing themselves into a situation where they have no concern.

The Court: Well, there is a good deal of force in what you say, but still I think I will hear what Judge Fletcher has to say.

Mr. Carter: I told Mr. Foster over the phone that we were expecting to come in here and present the matter, and that we hoped he would come over.

[fol. 661] Now, if it was Judge Fletcher and Mr. Overmyer, and they were in session, they ought to have come right over and let us dispose of it today. We have been waiting two extra days because they came in Monday morning.

Mr. Foster: On something that was presented to us this morning, your Honor, and they are at this very moment in session trying to read it.

The Court: There is this to be said, doubtless, that Mr. Overmyer has not seen fit to participate in this hearing.

Mr. Carter: He was here in person, and he has not ever said a word. He was here all day Monday, and he never said a word, not one.

Mr. Foster: Because he was represented by counsel.

The Court: Yes.

Mr. Foster: Of course he would not say anything. If your Honor please, may I just make this suggestion: I have gone far enough in this, I have not read over every word of it as yet, but I have gone far enough in fact into it to see that there are recitals herein which are vitally important to Mr. Overmyer.

The Court: They could not bind him in any way. He is not a party to the suit.

Mr. Foster: Well, now, that may or may not be so. I am inclined to agree with your Honor about that.

Mr. Gilbert: There can't be any question about it.

[fol. 662] Mr. Foster: Yes, there can be question about it, because there are recitals herein as to the value or non-value of his services, what he made.

The Court: There is merely the statement, as I recall it, that there is no showing here.

Mr. Gilbert: That is right.

Mr. Foster: And another thing, there are recitals herein, your Honor, that are prejudicial, in my judgment, in a hasty glance at it, there are recitals prejudicial to him in connection with it.

The Court: Well, I tell you what I think I am inclined to do in this case. I will take this petition——

Mr. Carter: You don't mean petition, do you, your Honor? The findings and decree, proposed findings and decree.

The Court: The findings of fact and the decree, they are agreed to by all the parties of record, and I know of no reason why it should not be signed, unless Mr. Overmyer desires to come in here and submit himself to the jurisdiction of the Court in the matter of this fee, formally enter his appearance in the case and become a party of record.

Now, if he does that, I will hear him. I think, as a matter of courtesy, tomorrow morning at 10:00 o'clock I will hear Judge Fletcher, hear what Judge Fletcher has [fol. 663] to say. He is an old friend of mine, and I should hate to refuse to hear him. But my view is that if he expects to have me make any finding here which is different from the finding which is agreed upon by all the parties of record here, and which, as I read it, seems to carry out literally the decision of the Court, he should come into this case formally, and in a way so that he will be bound by what transpired here, and if he does not like it, he can appeal to our Circuit Court of Appeals, and not be suing Mr. Lee in some other court.

Now, that is the practical situation about it.

Mr. Foster: May it please your Honor, you suggested the other day a type of finding or order which would require him to come in within a certain time.

The Court: It does.

Mr. Langworthy: This decree does so.

The Court: It does that very thing.

Mr. Foster: Yes.

The Court: This seventy-seven thousand dollars is retained here subject to the control of this Court. I can do anything I please with it. I may order it paid to Mr. Lee before I get through with it, or paid back to these claimants, or paid to Mr. Butler, or somebody who makes [fol. 664] a showing, or to somebody else subject to the control of the Court.

Mr. Foster: But that certain recitals, which we feel your Honor, upon reflection, will agree to, when it is called to your attention, should not be there, or at least modified perhaps, some of the language.

Mr. Gilbert: I am tired of being whipsawed on the outside of this case. We have been whipsawed for two years and a half, and we are getting tired of it. Let them come in here and make their showing.

Mr. Foster: We will come when the proper time comes, if it is necessary to come.

The Court: Yes.

Mr. Foster: All we want is an opportunity to be heard, and the courtesy of just a reasonable chance.

Mr. Langworthy: Your Honor does not understand that I, as representing the receiver, agree that a hundred and seventeen thousand five hundred dollars, those figures, are reasonable? I am not consenting to them. I did criticize them. Outside of that, of course, the decree is agreeable.

The Court: Oh, I understand.

Mr. Langworthy: Yes.

The Court: I understand. Your point is that it should be a hundred thousand, instead of a hundred and seven-[fol. 665] teen thousand.

Mr. Langworthy: Yes.

The Court: And you had figured it about a thousand or two difference on McConnell, and you had no testimony about Wordsworth.

Mr. Langworthy: No, and I don't think there is any sufficiency here to fix a fee for Wordsworth.

The Court: Well, I don't care as to the——

Mr. Lee: My understanding was that the Court was indicating simply, not that we were agreeing, but that the Court was indicating that we had agreed that this carries out what the Court said.

The Court: Yes.

Mr. Langworthy: Yes, that's right, your Honor, it does carry out what the Court said, although I had no hand in drafting it.

The Court: Well, I will dispose of this at 10:00 o'clock tomorrow morning.

Mr. Foster: And may I properly say to Judge Fletcher that he can appear here and be heard?

The Court: I will hear him.

Mr. Foster: Yes.

The Court: I will hear him. Tell him, however, that if he wishes to have this decree changed, he had better give serious consideration to whether Mr. Overmyer is coming [fol. 666] into this court and submit himself to the jurisdiction of the Court, and become a party to these proceedings.

(Whereupon the further hearing of the above-entitled matter was continued to Thursday, September 29th, A. D. 1932, at 10:00 o'clock A. M.)

[fol. 667] FABER

VS.

FOREMAN

Before Judge Wilkerson

Thursday, September 29, 1930—
10:00 o'clock A. M.

Court met pursuant to adjournment.

Present: Same as before.

The Court: Is there anything further in this case this morning?

Mr. Kearns: I know of nothing further. The parties seem to be here, your Honor.

Mr. Gilbert: We are ready for the decree, if your Honor please.

The Court: Do you have anything to say, Mr. Fletcher?

Mr. Fletcher: Well, if your Honor please, I hesitate to say anything, in the light of the statement made by your Honor yesterday, the purport of which was reported to me by Mr. Foster. I don't want to be in the attitude of

insisting upon arguing a matter here which I have no right to argue. I do think that the interests of this attorney in whom I am interested will be prejudiced by this decree [fol. 668] that has been submitted to the Court, but I am the last man in the world to insist upon butting into something that I have no right to butt into.

The Court: Well, it is not butting in; it is along the line substantially that was presented here the other day.

Mr. Fletcher: Yes, except I do think the decree does not carry out the views announced by your Honor, as we see them now.

The Court: In what respect?

Mr. Fletcher: In that it provides that these funds shall be paid over to Mr. Lee, not in his own right, but as the transfer agent for other persons who are mentioned. You see, I don't want to go into the thing, your Honor, except with your Honor's entire concurrence, and with the consent of counsel.

I am not in a position here to do so.

The Court: I tell you, I am willing to hear you, and give consideration to it as far as I am at liberty to do so in view of the fact that Mr. Overmyer is not a party to the record here.

Mr. Fletcher: Yes.

The Court: To that extent I am perfectly willing.

Mr. Fletcher: I am not much of a lawyer, your Honor, [fol. 669] but I am lawyer enough to know that anything I might say here is entirely by the grace and favor of the Court, because we are not parties to the record, not in a position to make the man whom I represent a party to the record at this time.

The Court: Well, you say that you think Mr. Overmyer would be prejudiced by having that portion of the allowance which does not go to Mr. Lee direct paid to him as transfer agent.

Mr. Fletcher: Yes. You see, your Honor, without going too much into the merits, he has a contract.

The Court: The contract is offered. Of course, I have not heard from him as to his construction of the contract, or as to what he claims under it.

Mr. Fletcher: The contract may or may not be of value. We think it is. But aside from that, that is not before the Court for consideration.

Now, this decree provides that Mr. Lee shall take the $183,000.00, and shall immediately pay fifty thousand of it to the gentleman in England, and fifteen thousand five hundred to his associate here. Now, the trouble about that is that if this contract should be held to be valid, Mr. Overmyer would be entitled to thirty percent of the entire amount, which in this case is $183,000.00, and yet the $50,-[fol. 670] 000.00 would have gone to England, and the fifteen thousand five hundred would have gone to Mr. McConnell, beyond the power of Mr. Lee to make restitution, and beyond the power of Mr. Overmyer to recover. At least that is the way we see it.

Now, here is a singular case, where a man is not a party to the record, and yet his rights are being profoundly affected by the decree, and that is the embarrassing and difficult position I am placed in.

Mr. Gilbert: May I call your Honor's attention to the fact, although this is not a matter of controversy between us and Mr. Overmyer, it is between Mr. Lee and Mr. Overmyer, that the contract provides not that Mr. Lee only shall give thirty per cent of what he receives, it says Mr. Lee and Mr. Wordsworth shall both give thirty percent to Mr. Overmyer.

Mr. Fletcher: We don't want to get in a position where we have got to litigate with Mr. Wordsworth in London.

The Court: I am not passing on that contract——

Mr. Fletcher: No.

Mr. Gilbert: No.

The Court (continuing): —as far as it affects Mr. Overmyer's rights and the rights of the other parties. I reached the conclusion in this case that so far as the fee paid out of this fund is concerned, it is the duty of this Court to [fol. 671] proceed precisely as if the parties had not undertaken by that so-called settlement agreement to lay down rules and establish a standard for the Court. In that view I conceived it to be the duty of the Court, under these equity rules, to make a finding as to the value of the services of each attorney who claimed to have contributed something to the occasion of the fund, and in that view I have announced my finding of the value of the services which had been shown here at the trial.

I read the findings and the decree, but I thought before I read it critically, with a view to arriving at any definite

conclusion and acting upon it, and closing it, I would hear any suggestions which Judge Fletcher had to make, because I wanted to close the findings and the decree with an open mind, so far as his suggestions are concerned.

Mr. Fletcher: I wonder, your Honor, if it would be out of place if I made this suggestion to Court and counsel that on page 16 of the submitted final draft—through the courtesy of counsel we got a copy of this final draft, I have no desire to delay the matter, certainly not, and in any matter that does not affect Mr. Overmyer, it is none of my business, but I was wondering if it would accomplish the [fol. 672] same purpose, and at the same time preserve the rights of everybody, if the words beginning "services rendered" on page 16——

Mr. Carter: Page 15.

Mr. Fletcher: Page 15, I beg your pardon. (Continuing:) —might read this way:

The Court: Beginning what?

Mr. Fletcher: The words beginning "services rendered."

Mr. Carter: Do you want to follow it here, your Honor? There is a copy of it.

The Court: I left mine in the other room.

Mr. Foster: You might just hand that to the Court. That is the suggested part. You can follow that.

Mr. Fletcher: "The services rendered by said John H. S. Lee to the original plaintiffs and intervenors are now found to be of the fair and reasonable value of $183,000.00. Of this amount fifty thousand — is attributable to services rendered by Ralph Wordsworth to the original plaintiffs and intervenors, and $15,500.00 is attributable to the services of Thomas C. McConnell to the original plaintiffs and intervenors. The Court likewise finds that maybe there should be an additional allowance to the said John H. S. Lee by reason of services herein rendered by one Franklin S. Overmyer and his associates of the value of $77,000.00, or some part thereof; but the Court finds that at this time there is before the Court no sufficient proof [fol. 673] of such services that would justify an award to the said Lee by reason of the said services of said Overmyer and his associates. Said sum of $77,000.00, approximately three-thirteenths thereof to be in notes and ten-thirteenths to be in cash, should be retained by the Foreman State Trust & Savings Bank and/or the First Union

Trust & Savings Bank subject to the further orders of this Court. Upon the record now before the Court, the said sum of $183,000.00 is hereby found to be reasonable for attorneys' fees and solicitors' fees for services rendered by the said Lee with the assistance of the said Wordsworth and the said McConnell."

Now, a finding of that kind, it seems to us, would preserve the rights of all the parties, and at the same time not put the Court——

Mr. Langworthy: Have you a copy of that?

Mr. Fletcher: I am sorry, that is all the copies we have. This finding by the Court as to the value of the services of Mr. Wordsworth and Mr. McConnell would at the same time leave open all questions which should be heard in a later proceeding.

Mr. Lee: May I be heard on that suggestion, if the Court please, if the Court cares to hear me?

The Court: Briefly, Mr. Lee, what do you think about it? [fol. 674] Do you object to it?

Mr. Lee: Yes, I do.

The Court: Mr. Lee is a party to the record here.

Mr. Lee: Yes. In other words, as Mr. Gilbert has said, the contract between Mr. Overmyer and Mr. Wordsworth and myself was not a contract that I should pay Mr. Wordsworth or Mr. Overmyer. It was a contract that was made specifically subject to the terms, provisions and conditions of the original agreement, and recited the divisions.

Now, I should not certainly be required to have Mr. Overmyer take action against me for a claim he has against Mr. Wordsworth. We have followed in that decree just what your Honor said, word for word, just the theory of your Honor.

The Court: Let me say this. Aside from what I said as to what my views may be, I did arrive at the conclusion that there was to be $183,000.00 paid on account of attorneys' fees in this case.

Now, I understand, that as to the language of the decree, with reference to the payment and distribution of that $183,000.00, the parties are all in accord with the language as it appears in the draft of the decree submitted, is that right?

Mr. Gilbert: That is right.

[fol. 675] Mr. Lee: Yes, sir, absolutely. We followed very closely your Honor's reasoning, not only the language, but the underlying basis, upon which it seems to me only you could have arrived at a conclusion.

The Court: Now, I arrived at the conclusion that in a case of this kind, where services are rendered by different groups of lawyers, it is incumbent, under the equity rules, for the Court to make a finding as to the value, that is, a finding of facts with reference to what each one contributed to the fund, so far as it is possible for the Court to do it upon the evidence.

I may be wrong about it, but that was my conclusion, and at this stage of the case why that goes in this case.

Mr. Fletcher: If your Honor please, I have no desire to go into or re-argue that again.

The Court: No. Well, now, I have your views on that. Now, you say finding 16, on page 24, should be eliminated.

Mr. Gilbert: No. 16?

The Court: That is that long finding.

Mr. Gilbert: That provision was put in by Mr. Lee. I should not want to be heard upon that point. I say, I don't want to be heard on that.

The Court: I understand that. I will examine that carefully.

[fol. 676] Mr. Fletcher: We have some further suggestions as to the findings of law, and also as to the terms of the decree itself.

To shorten this matter, if your Honor purposes to examine this, I will just submit it in writing, without taking time to argue anything more.

The Court: Is it all here?

Mr. Foster: Yes.

Mr. Fletcher: It is all there.

The Court: Very well. I will take it under advisement, and dispose of it.

Mr. Langworthy: I think, if your Honor please, perhaps I ought to have a copy of it.

Mr. Fletcher: You certainly ought. We will furnish it as soon as we can get it.

Mr. Kearns: Will you furnish me with one?

Mr. Fletcher: Yes.

The Court: I intend to dispose of this matter today sometime. Another judge will have this court room in ten

or fifteen minutes, and I will take it up and dispose of it. If you have anything to submit in writing, can you let me know it by half past eleven?

Mr. Langworthy: I don't know that I want to submit anything in writing.

The Court: Let me have it, if you have. Or will you [fol. 677] do this: If you want to submit anything, will you telephone me by half past eleven?

Mr. Langworthy: Oh, certainly.

Mr. Carter: We will come back at half past eleven?

The Court: No, ask the clerk. I will dispose of this matter. If I change the decree, I will change it myself, and will file it myself, the findings and the decree.

Mr. Langworthy: There is no further occasion then for us to appear here?

The Court: No further occasion to appear. The matter is under advisement, and the matters under decree will now be perfected, if necessary to do so, signed by the Court, and filed by the clerk.

Mr. Lee: May I make one suggestion in writing on this last proposition?

The Court: Certainly.

Mr. Lee: We simply follow the document, the document known as Mr. Pepys' Exhibit 3, which is the agreement between Mr. Wordsworth and Mr. Overmyer and myself, which was by its terms made subject to the terms, provisions and conditions of the agreement. There is no question about that. If your Honor will look at the contract, it specifically recited that.

The Court: I have it on my desk.

Mr. Lee: Yes. And my understanding of it was that [fol. 678] the opinion of the Court particularly referred to that, because you said you had examined the contract between us——

The Court: You are quite right about that.

Mr. Lee (continuing): —and the original parties, and you said in view of the fact that our contract had those certain items, you proposed to find out what each of the attorneys rendered.

The Court: I think I said just those words.

Mr. Lee: Just exactly. Now, that was the basis of your decision, and that is the underlying justification, from my point of view, of your Honor, in going into that thing,

otherwise you would have taken the testimony of Mr. Tenney, I think, without hesitation, except for the fact that you found that the terms of the contract are made subject to those specific provisions, and that was your justification for going into that, as I understand.

The Court: What I had in mind was this: That when this letter was sent out to these interveners that you were going to ask for twenty per cent in this case, back of that letter was this contract, and this twenty per cent was to go to Wordsworth and thirty to Overmyer. I was going to inquire into that.

Mr. Lee: And the contract specifically set forth it was a matter that your Honor should inquire into.

[fol. 679] The Court: Yes.

Mr. Lee: According to the way you interpret it.

The Court: Yes.

Mr. Lee: Now, they object to the finding that was the basis for your decision. I am not going to have a decree entered except following the reasoning of your decision.

The Court: I have in mind your point.

Mr. Fletcher: I have only this to say. We are perfectly content if your Honor will take up these suggestions, and bear this in mind, that our only contention here is the hope that nothing will be entered here that will prejudice Mr. Overmyer in his future negotiations and proceedings about this matter, and that nothing will be done to take this fund out of the jurisdiction of the Court until the matter is settled.

The Court: This decree reserves jurisdiction, doesn't it?

Mr. Kearns: Yes, over the seventy-seven thousand.

Mr. Lee: Just one thing. Certain statements here might be regarded by your Honor as puffing. We followed exactly what your Honor said; and the Courts say, as your Honor knows by the authorities, that it depends upon the difficulty of the suit.

For instance, in a foreclosure suit tremendous fees are [fol. 680] allowed, yet an intelligent clerk can do all the work, and therefore, this has a direct bearing upon the finding of your Honor with regard to the services.

The Court: I say again what I said then, in arriving at a conclusion as to a fee in this case, we cannot put out of mind that Mr. Lee got some authorities with reference to

the jurisdiction of this Court to frame a bill here on a theory that certainly requires a great deal of study and a high degree of ability.

Mr. Fletcher: On that we heartily agree.

The Court: There is no doubt about it, and as far as that is concerned, I think he is entitled to a finding as to the Court's opinion of the knowledge of equity proceeding required to devise a bill of this kind.

Mr. Gilbert: We still do not think it is a good one.

Mr. Fletcher: I hope nobody here will construe anything we have said or done as going to the value of Mr. Lee's services. Our objection was confined to that paragraph.

The Court: While I was inclined to the opinion when I read the bill, I followed Mr. Lee's argument, and read the bill several times before I arrived at the conclusion it would stand. I think it is a good bill now, at least, it is good as against your motion to dismiss.

Mr. Gilbert: May I humbly pray, in conclusion, that you [fol. 681] keep in mind that the request made here is not made by a party to the suit, and that the parties have worked very studiously over this matter, and have attempted, so far as any of us are concerned, not to adjudicate any of Mr. Overmyer's rights.

Mr. Langworthy: There was an order entered here upon my first appearance in court that a statement should be furnished to myself of the services of all the solicitors for whom your Honor was expected to make an allowance, for which services your Honor was expected to make an allowance.

We have never had a statement of any services that were performed by Mr. Overmyer, except what Mr. Lee testified to on the stand.

Mr. Kearns: May I just state for the record that the bank defendants expect to comply with the decree forthwith upon its entry, and if any one has any idea of an appeal, they had better do whatever is necessary.

Mr. Gilbert: No one who is not a party to this cause can appeal.

The Court: The parties have all said the decree is in harmony with the ruling of the Court.

Mr. Kearns: I simply wanted to make the statement.

Mr. Fletcher: It is just bear-ly possible, your Honor, that after looking over your suggestions or observations, your

[fol. 682] Honor would make such changes in the decree as would make counsel's observation pertinent.

Mr. Carter: If your Honor please, that copy I handed up has a few corrections that may not be on your copy.

It was further stipulated and agreed by and between all of the counsel in open court that the depositions taken in the above cause in London, and the Exhibits thereto attached, now on file in the Clerk's Office in this proceeding, prepared or filed by the respective parties in this cause should be considered a part of the record and introduced in evidence therein.

[fol. 683] ORDER SETTLING STATEMENT OF EVIDENCE

Be it further remembered that the above and foregoing was all the evidence and exhibits of evidence offered or introduced on said hearing of said cause.

And inasmuch as the matters above set forth do not fully appear of record, the defendants Foreman-State Trust and Savings Bank and First Union Trust and Savings Bank tender this statement of evidence and pray that the same may be certified under the hand and seal of the judge of this court and thereby made a part of the record, and it is accordingly certified this 7th day of October, A. D. 1932.

(Signed) James H. Wilkerson, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division. (Seal.)

Presented this — day of ——, A. D. 1932.

O. K.

Levinson, Becker, Gilbert, Peebles & Swiren. Butler, Pope, Ballard & Etting. Langworthy, Stevens, McKeag and McCornack. B. F. Langworthy, J. H. S. Lee, Burry, Johnstone, Peters & Dixon.

—— ——, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division. (Seal.)

[fol. 684] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

I, Charles M. Bates, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of statement of evidence in the matter of Arthur Traviss Faber et al. vs. Foreman State Trust and Savings Bank, a corporation, et al., No. 10538, as same appears from the original filed in said Court on the 7th day of October, A. D. 1932, and now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office, in Chicago, in said District, this 10th day of October, A. D. 1932.

Charles M. Bates, Clerk. (Seal.)

[fol. 685] IN UNITED STATES CIRCUIT COURT OF APPEALS

4764

H. C. W. LAUBENHEIMER, United States Marshal, et al.

vs.

JOHN FACTOR, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Oct. 11, 1932

Now this day come the parties by their counsel and the motion of the appellee to dismiss this appeal now comes on to be heard on oral argument by Mr. G. Gale Gilbert, Jr. and Mr. Allan J. Carter, counsel for appellee in support of said motion, and by Mr. Franklin R. Overmyer, counsel for appellant, in opposition thereto, and the court having heard the same takes this matter under advisement.

[fol. 686] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM AND SESSION, 1932

No. 4764

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General, Appellants,

vs.

JOHN FACTOR, Described in the Extradition Proceedings as Harry Wise, alias J. Factor, alias Guest, alias J. Walker, Appellee

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Before Alschuler, Evans, and Sparks, Circuit Judges

OPINION—Filed October 15, 1932

ALSCHULER, Circuit Judge:

The appeal is from an order of the District Court discharging Factor, on habeas corpus, from custody under commitment by a United States Commissioner for his rendition to England, from Illinois, where he was found.

The complaint by representatives of the British Government charged that Factor was a fugitive from the justice of England, where, it was alleged, he had committed the crime of receiving from Broad Street Press, Ltd., large sums of money aggregating £458,500, knowing the same to have been fraudulently obtained, a crime alleged to come within the extradition provisions of treaties between Great Britain and the United States.

There was a protracted hearing before the Commissioner, who found there was cause to believe that Factor had committed in England the crime charged, that it was a crime within the provisions of the treaties between this [fol. 687] country and Great Britain, and one that would be criminally punishable in the state of Illinois if committed there; and he ordered Factor to be committed to abide the order of the Secretary of State, to whom he directed the record of the proceedings to be certified pursuant to the applicable federal statute.

Whatever may be disclosed when the cause comes on for trial, it can scarcely be gainsaid that the evidence before the Commissioner tended to indicate the formation in England and the execution there of an ambitious scheme, of which Factor, under various aliases, was the central figure, and whereby vast sums of money were fraudulently extracted from the British public, and much of it knowingly received by Factor, who came with it to Illinois.

We will first dispose of a motion recently made on behalf of Factor to dismiss this appeal upon the ground that the treaty had been misused by the British Government and its representatives, in that the extradition proceeding was being employed for the collection of private debts against Factor, claimed to have accrued to British citizens by reason of Factor's said alleged fraudulent conduct.

The motion and its supporting affidavit allege that about the time of the institution of the extradition proceeding there was commenced against Factor in the United States District Court for the Northern District of Illinois a civil action by British complainants for the recovery from Factor of proceeds of his alleged fraudulent conduct, and that counsel representing the British Government in the extradition proceeding entered into an agreement whereby such counsel should receive for himself a part of whatever counsel fees should accrue to the attorneys for the complainants in the civil suit; that under date of January 6, 1932, a written contract was made between such counsel for the British Government and counsel representing the complainants in the civil suit, whereby the former should receive thirty per cent of whatever fees so accrued to the latter in the civil suit; that the civil suit against Factor was afterward compromised by the payment to complainants of $1,300,000, and that the reasonableness of complainants' counsel fees was to be adjudicated by the judge of said District Court; that upon the hearing of the matter of the counsel fees the contract between counsel was shown, and the court ordered that $77,000 of the counsel fees allowed by the court should be paid into court, and retained for further adjudication as to whether or not said counsel for the British Government, who claimed that amount for him- [fol. 688] self, should be allowed and paid that amount; that it was through such proceeding that Factor and his counsel first learned of any agreement between said coun-

sel for the British Government and counsel for complainants in the civil suit for a division of fees; and that upon such hearing of the matter of the counsel fees it was stated that the British Consul General at Chicago and the British Embassy at Washington knew of the said agreement whereby the counsel for the British Government should receive for himself a part of any counsel fees accruing in the civil suit.

On behalf of appellants herein it was contended that the facts alleged in the motion and its supporting affidavit, if admitted to be true, did not warrant the granting of the motion.

Under our law, extradition is not a judicial function; it is reposed in the Department of State. 18 U. S. C., sec. 651. In case the magistrate issuing the warrant of arrest, and hearing the evidence, deems the evidence sufficient to sustain the charge under the treaty, he certifies the same, together with copy of all testimony taken before him, to the Secretary of State, and thereupon his function ceases. No appeal lies to any court from the acts or findings of such committing magistrate. Collins v. Miller, 252 U. S. 364. If the committing magistrate had jurisdiction of the subject matter, and of the accused, and the offense charged is within the treaty, and there was evidence sufficient to establish the criminality of the accused for purposes of extradition, habeas corpus will not lie to review the action of the magistrate. McNamara v. Henkel, 226 U. S. 520; Bingham v. Bradley, 241 U. S. 511. In Fernandez v. Phillips, 268 U. S. 311, it was stated that in such proceedings habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense is within the treaty, "and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe accused guilty."

This is an appeal from an order of the District Court made in a habeas corpus proceeding, and the function of this court is to review the record made before the District Court with a view to determining whether in that court reversible error intervened. The issue presented by the motion cannot be raised on habeas corpus, and surely not on appeal therein.

We are aware of those instances where, even on appeal, matters may be shown, such as release of errors or settle-

ment of the controversy, whereby further prosecution of [fol. 689] the appeal and decision thereon would be moot or futile. But the motion does not present such a case. Here extradition is sought to be defeated through alleged transgression of the treaty by the demanding nation. This involves a question not judicial, but political. It would indeed be incongruous, and tend toward incalculable mischief and complication to accord to the various courts of the land power to inquire into and to pass upon the motives and conduct of foreign countries in their treaty relations with this country—a function peculiarly within the province of the state department of our government, and indeed made so by statute. 18 U. S. C., secs. 651, 653, 654; In re Lincoln, 228 Fed. 70.

The motion to dismiss the appeal is denied.

The treaty provisions involved are Article X of the "Webster-Ashburton" Treaty of 1842, and Article I of the "Blaine-Pauncefote" Treaty of 1889. The first, after specifying by name seven major crimes for the commission of any of which the alleged offender in one country found in the territory of the other may be extradited, proceeds:

"Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, *would justify his apprehension and commitment for trial if the crime or offense had there been committed;* * * *"

The second supplements the extraditable crimes specified in the first by adding ten further classifications of crimes which will subject the offender to extradition. Classification 3, which embodies the crime here charges, is:

"Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained."

Classification 4 of the Article is:

"Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, *made criminal by the laws of both countries.*"

Classification 10 is:

"Crimes and offenses *against the laws of both countries* for the suppression of slavery and slave-trading."

None of the classifications of Article I, except 4 and 10, make any reference to the "laws of both countries."

It is contended for appellants that because classifications 4 and 10 alone of the ten classifications specify the require-
[fol. 690] ment that the offenses therein named be criminal "by the laws of both countries," it follows that there is no such requirement as to the other classifications, and that in this case it is sufficient that the acts charged were criminal by the laws of England. In line with this contention it is further maintained that the above quoted provision of Article X of the Treaty of 1842 has application not to the crime itself as necessarily an offense under the laws of both countries, but only to the evidence of criminality whereby apprehension and commitment for trial of the alleged criminal for a crime committed in the asylum country would be justified.

However plausibly or even convincingly these contentions are supported, an insuperable obstacle to our acceptance of them is the fact that the United States Supreme Court has held otherwise. Collins v. Loisel, 259 U. S. 309; Kelly v. Griffin, 241 U. S. 6; Wright v. Henkel, 190 U. S. 40.

Appellants further contend that if identity of the crime in both demanding and asylum countries is required, this would in the instant case be satisfied through a statute of the United States substantially defining the very crime here charged. 18 U. S. C., sec. 467. This too seems to have been authoritatively decided contrary to appellants' contention. Pettit v. Walshe, 194 U. S. 205, citing Wright v. Henkel, supra.

This brings us to the controlling question in the cause, well stated in Judge Carpenter's opinion in the District Court in these words:

"The record shows that the crime charged in London was, 'Receiving money knowing it to have been fraudulently obtained,' and that such was in fact one of the crimes enumerated in the Treaty of 1889 between this country and Great Britain. The record also shows that 'receiving money knowing it to have been fraudulently obtained' was made criminal by the laws of Great Britain. We are concerned in the present proceeding solely with the fact whether or not it was a crime in the place of asylum, State of Illinois."

The controversy rages primarily about the proposition of the binding effect here of the following, which was said in Kelly v. Griffin, 241 U. S. 6, in passing on a habeas corpus for Kelly's release from commitment for extradition from Illinois to Canada:

"The last charge, stealing or embezzling and receiving money fraudulently obtained needs a word of explanation. It may be assumed that there is no evidence of larceny or [fol. 691] embezzlement as (commonly) defined, but the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois."

Appellants contend that this decision of the Supreme Court is controlling here, while appellee maintains that the question of the law of Illinois on that subject is one of fact, determinable upon the evidence thereon before the Commissioner. Appellee's contention thereon, as well as his construction of the Kelly-Griffin decision, is as stated in the following excerpt from Judge Carpenter's opinion:

"This is purely a question of fact. It can be nothing else. The record shows evidence was offered by the Respondent of eminent judges and learned assistants to the State's Attorney of Cook County, Illinois. Each one of them testified that as a matter of fact the obtaining of money, knowing it to have been fraudulently obtained, was not a crime in this State. The witnesses, the judges and the assistants to the State's Attorney were open for cross-examination. The Commissioner allowed the other side to offer evidence on the same point, the only limitation being that there should be five such witnesses on each side, and no more."

The judge then discusses Kelly v. Griffin, which he rightly says "is the nub of the whole situation," and proceeds:

"Now, it must be perfectly clear that the Supreme Court of the United States could not, and Mr. Justice Holmes (who delivered the opinion) did not intend to hold that it was an offense against the peace and dignity of the State of Illinois, when in fact it was not.

"Lawyers on both sides have scoured the Acts of Legislature on this point. They have gone all through the Crimi-

nal Code. All that they can find is the Fraudulent Conveyance Act.

"Mr. Justice Holmes did say, in general language, that receiving money from one, knowing it was fraudulently obtained, was a crime against the State of Illinois. Whether it was or not was a question of fact. The record in this case discloses that, in fact, there was no such crime in the State of Illinois. No statute has been produced, in the judgment of the Court, making it a crime.

"The testimony of the expert witnesses, if I may so designate them, is all to the effect that there was no such crime on the books of the State of Illinois or at common law, as administered in the State of Illinois. The whole proceeding must stand or fall on that question of fact."

It is thus apparent that the judge treated the decisive question of what is the law of Illinois as a question of fact, [fol. 692] and predicated his decision largely upon the testimony of the legal experts who testified.

It is too well settled for discussion that Federal courts take judicial notice of the public laws of all the states, and of course of the particular state wherein the court is sitting. Straton v. New, 283 U. S. 318, 328; U. P. R. Co. v. Wyler, 158 U. S. 285, 296; Gormley v. Bunyan, 138 U. S. 623, 635. This applies as well to authoritative decisions of the highest state tribunal declaring the law of the state. Lamar v. Micou, 114 U. S. 218, 223.

No reason is apparent why this should be otherwise on habeas corpus to relieve from commitment for extradition. Indeed, in Hogan v. O'Neill, 255 U. S. 52, it was held that on habeas corpus to relieve from detention for interstate extradition a Federal court will judicially notice the laws of the demanding state. We are satisfied that the District Court erred in holding the question to be one of fact, and in according effect to the testimony of the legal experts as to what is the law of Illinois.

But if this theory as adopted by Judge Carpenter were correct, and the question as to the law of Illinois were one of fact upon which opinion evidence was proper, the evidence before the Commissioner on this subject was not alone that of the legal experts. There was also evidence decidedly to the contrary.

When the Kelly-Griffin case was in the District Court of the Northern District of Illinois, before Judge Landis, he

gave an opinion to the effect that acts similar to those here alleged were criminal under the law of Illinois as well as the law of Canada, which was seeking Kelly's extradition. The Supreme Court, on appeal, sustained the discharge by Judge Landis of the writ of habeas corpus which had been sued out by Kelly. The decisions of Judge Landis and of the Supreme Court were before the Commissioner. Furthermore, while Factor's case was pending before the Commissioner, habeas corpus was sued out by him and heard in the same District Court before Judge FitzHenry, of the Southern District of Illinois, who decided that under the ruling of the Supreme Court in Kelly v. Griffin he must hold, and he did hold, the acts charged against Factor were criminal under the laws of Illinois.

If the testimony of the jurists and lawyers was competent as fact evidence of the law of Illinois, these decisions [fol. 693] likewise afforded competent evidence bearing upon the same fact, and the Commissioner's finding upon a controverted question of fact is not reviewable upon habeas corpus. Fernandez v. Phillips, 268 U. S. 311; Ornelas v. Ruiz, 161 U. S. 502.

The expert witnesses testified that in the Kelly-Griffin opinion the law of Illinois was incorrectly stated, but they advanced different theories for avoiding its binding effect. Some said that it was merely obiter dictum. One of the judges stated that it was not obiter dictum, but was comment upon a question of fact and therefore not binding.

Examination of the Kelly-Griffin opinion indicates to us that, far from being obiter dictum, the quoted excerpt therefrom is a direct and pointed decision of the very thing the Supreme Court undertook to decide. Kelly was charged with a number of crimes against the laws of Canada, among them the very crime here charged. The stated paragraph of the opinion eliminates certain of the charges made, and clears the way for sustaining the extradition upon the treaty crime of receiving property known to have been fraudulently obtained. It assumes there was no evidence against Kelly of the treaty crimes of larceny or embezzlement, which were also charged against him, and sustains as a crime "in both Canada and Illinois" the charge of receiving property known to have been fraudulently obtained. What the court said thereon has such direct bearing upon a definite and controlling issue in that controversy that

we are not at liberty here to ignore it as "obiter dictum."

Both in the expert evidence and in Judge Carpenter's opinion it is pointed out that the Supreme Court did not indicate any statute of Illinois which declares such acts to be criminal there. But we are concerned with that court's holding, rather than with the route or course whereby the holding was reached. Enough for us to know that the Supreme Court, in a controversy wherein that issue was directly involved, definitely decided that receiving property, knowing it to have been fraudulently obtained, was criminal in Illinois, and afforded basis for extradition under the same treaty provisions here involved.

The duty of the inferior courts in such contingency seems plain. It was well pointed out by one of the testifying judges, saying, in answer to a question as to the duty of courts if the matter had indeed been passed upon by the Supreme Court:

"I think that decision of the Supreme Court of the [fol. 694] United States of an international extradition is binding on every court in the United States; I don't think there is any doubt about that. We may think it is wrong but we have got to follow it."

Any other course would inevitably tend to inharmony and confusion.

Undoubtedly the Supreme Court had before it the opinion of Judge Landis in the District Court, wherein he pointed out that the crime alleged was covered in Illinois by the Fraudulent Conveyance Act, sec. 294, c. 38, Rev. Stat. Ill.; and it seems to us that, in the broad sense, the acts charged against Factor if committed in Illinois might be penalized under that section. A number of other allegedly applicable sections are called to our attention by appellants, among them the Illinois conspiracy laws. While it is true that conspiracy is not one of the extraditable offenses specified in the treaties, yet in practice the charge of conspiracy has been so broadened and amplified that, in effect, it includes and covers a multitude of sins, far beyond the limits of the old-time common law conspiracy. Broadly speaking, if the receipt from others of vast sums of money, with knowledge of the fraudulent manner whereby they were obtained, might be criminally reached

in Illinois under its conspiracy laws, this would most likely answer the treaty requirements.

We make these suggestions, not because it is for us to support the Supreme Court's definitely stated conclusion in the Kelly case, but to indicate our faith that its decision, and its words employed in making it, were not inadvertent, nor a mere slip or oversight—as has been variously suggested—nor out of line with the well defined and commendable trend toward liberality in construing and applying treaties and facilitating the rendition of alleged offenders against the laws of friendly nations.

As indicating such definite tendency, though at risk of prolixity, we quote from some of the many decisions of the Supreme Court. In Grin v. Shine, 187 U. S. 181, 184, it is said:

"There is such a general acknowledgment of the necessity of such treaties that of late, and since the facilities for the escape of criminals have so greatly increased, most civilized powers have entered into conventions for the mutual surrender of persons charged with the most serious non-political crimes. These treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused.

[fol. 695] "In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, viz., submit themselves to the laws of their country. * * * where the proceeding is manifestly taken in good faith, a technical non compliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably at least no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community, is rather to be welcomed than discouraged."

In Yordi v. Nolte, 215 U. S. 228, 230, the court quoted with approval from Ex parte Sternaman, 77 Fed. 595:

"'The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a correct decision upon the main question—is there reasonable cause to believe that a crime has been committed?'"

Benson v. McMahon, 127 U. S. 457, 466, involved extradition between Mexico and the United States. It was urged for Benson that the treaty crime of forgery charged against him did not include as a forgery a printed instrument. As to this the court said:

"It certainly does not appear from this that the Mexican authorities intended to be bound in the treaty by any very restricted use of the word 'forgery' when the question concerned an offence of that character committed in Mexico. It is for an offence against Mexican law that the prisoner is held to answer. As he is not now upon final trial, but the only question is whether he has committed an offence for which, according to this treaty, he should be extradited to that country and there tried, we do not see that in this application to set the prisoner at large, after he has been once committed by an examining court having competent authority, and after having been held to answer in Mexico for the offence charged, this court is bound to examine with very critical accuracy into the question as to whether or not the act committed by the prisoner is technically a forgery under the common law. Especially is this so when the wickedness of the act, the fraudulent intent with which it was committed and the final success by which the fraud was perpetrated, are undoubted."

In Collins v. Loisel, 259 U. S. 309, it was contended that [fol. 696] an extraditable offense was not charged. The statute of the demanding country, India, made guilty one who cheated and dishonestly induced one to deliver property to another. The statute of Louisiana, the asylum state, denounced the obtaining by false pretense of property with intent to defraud. The court said:

"The law does not require that the name by which the crime is described in the two countries shall be the same;

nor that the scope of the liability shall be co-extensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. This was held with reference to different crimes involving false statements in Wright v. Henkel, 190 U. S. 40, 58; Kelly v. Griffin, 241 U. S. 6, 14; Benson v. McMahon, 127 U. S. 457, 465; and Greene v. United States, 154 Fed. 401. Compare Ex Parte Piot, 15 Cox C. C. 208. The offense charged was, therefore, clearly extraditable."

In the Kelly-Griffin opinion, referring to the charge of perjury there also under consideration, the court significantly said:

"It is objected that although perjury is mentioned as a ground for extradition in the treaty, the appellant should not be surrendered because the Canadian Criminal Code, Sec. 170, defines perjury as covering false evidence in a judicial proceeding 'whether such evidence is material or not.' As to this it is enough to say that the assertions charged here were material in a high degree and that the treaty is not to be made a dead letter because some possible false statements might fall within the Canadian law that perhaps would not be perjury by the law of Illinois. 'It is enough if the particular variety was criminal in both jurisdictions.' Wright v. Henkel, 190 U. S. 40, 60, 61."

In Glucksman v. Henkel, 221 U. S. 508, the Supreme Court, speaking by the same Justice who afterwards delivered the opinion in the Kelly-Griffin case, said:

"It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For while of course a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender."

United States ex rel. Klein v. Mulligan, 50 F. (2d) 687 (C. C. A. 2), dealt with a habeas corpus brought to release Klein, found in New York, an associate of Factor, and

charged in an extradition proceeding with substantially [fol. 697] the same offense as that here in issue. The precise question did not enter into that case, since New York has a statute quite similar to those of Canada and England on the subject of receiving property knowing it to have been obtained by fraud. That case, however, and the opinion of Judge Knox therein in the District Court, present some review of the facts, of possible interest here, since substantially all the evidence in Klein's case was before the Commissioner in the case at bar.

Judge Dickinson's recent opinion in United States ex rel. Geen v. Fetters, in the District Court for the Eastern District of Pennsylvania, is quite to the point. Geen was another of Factor's associates, and his extradition from Pennsylvania to England was sought. Practically all the evidence in his case was offered there, and the issues were substantially identical. It seems from Judge Dickinson's opinion that in the respects here in issue he considered the law of Pennsylvania as similar to that of Illinois—no statute in either state in specific terms defining as a crime the receiving of property knowing the same to have been obtained by fraud. But he recognized and followed the binding authority of Kelly v. Griffin, saying:

"This phase of the discussion may be summed up in the comment that the law of Pennsylvania denounces the crime of 'receiving moneys knowing them to have been fraudulently obtained' quite as nearly as the law of Illinois was found to do in Kelly v. Griffin, 241 U. S. 6."

However, appeal from his order discharging the writ is pending in the Court of Appeals of the Third Circuit.

Neither by statute nor by authoritative judicial decision has there been any change in the law of Illinois upon this subject since Kelly v. Griffin was decided, and regarding as we do the decision in that case as here binding, we must and do conclude that the District Court erred in holding otherwise.

The order of the District Court is reversed, and the cause is remanded to that court with direction to discharge the writ of habeas corpus, and for further proceedings in consonance herewith.

Dissenting Opinion

Evans, Circuit Judge, dissenting:

Judge Alschuler, in the majority opinion, has characteristically stated the facts, the questions involved, and the contentions of the parties, so fairly and fully that no additional or modifying statement is necessary or justifiable. Like-
[fol. 698] wise, the reasons for the conclusions reached by the majority are so clearly pronounced as to leave the statement of the grounds of my dissent comparatively easy and to limit our differences to a very narrow compass.

If the cause of action (receiving money knowing it to be fraudulently obtained), a criminal offense in England, is or was an offense against the laws of the state of Illinois, the commonwealth wherein Factor was apprehended, then the judgment of the District Court should be reversed. It is only in reference to the answer to this question that I differ with the majority opinion. The disposition of questions preliminary to this one meets with my approval.

The majority opinion is based entirely upon the Supreme Court decision rendered in Kelly v. Griffin, 241 U. S. 6. That decision, rather than any Illinois statute, is the reliance of the majority opinion (as it was, and is, of appellants' counsel) for the conclusion reached. I confess it was at first determinative of the question with me. A willingness to accept and apply the law as announced by the Supreme Court must, of course, ever actuate this court.

What effect then should be given to the language of the court in the Kelly Case (p. 15):

"The last charge, stealing or embezzling and receiving money fraudulently obtained needs a word of explanation. It may be assumed that there is no evidence of larceny or embezzlement as (commonly) defined, *but the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois.* There may be a doubt whether the appellant if a party to the fraud, received the money of the Government directly from it, or through a third hand so as to be guilty under this count of the complaint. We are not prepared to pronounce his detention upon the count unjustifiable in view of the finding. We assume, of course, that the Government in Canada will respect the convention between the United States and

Great Britain and will not try the appellant upon other charges than those upon which the extradition is allowed."

If the majority opinion be correct in saying that this quotation settles the case regardless of any erroneous statement therein set forth, then the appeal before us is easily disposed of, and correctly so, by the majority opinion, for I find no justification for saying that the above language of the Supreme Court was dictum.

It seems to the writer, however, that the Supreme Court was announcing a proposition, the soundness of which may, [fol. 699] in this, a different case, be challenged. That there has been no change in this respect in the Illinois criminal statutes must be conceded. Appellee has the right to ask, What is the Illinois statute which makes it an offense against the laws of Illinois to do the acts with which he is charged? For appellants with commendable frankness admit that the offense charged was not a crime at common law. Counsel for appellants do not seriously rely upon the statute which Judge Landis said in the Kelly Case was the Illinois statute defining the crime of receiving property knowing the same to have been fraudulently obtained. The offense charged against appellee, which apparently is a criminal offense in England, is at most a species of the genus—fraud. It exists, if at all, only because a statute makes it a criminal offense. Waiving to one side all rules which necessitate a strict construction of the criminal statutes, the stubborn fact which confronts us is that no Illinois statute has been found which makes it a criminal offense to do the acts charged against appellee. Counsel have not cited any statute, and the court has found none. Nevertheless, although no statute thus exists, we are asked by appellants to admit its existence because the Supreme Court in the case referred to was led into the belief that such a statute existed.

The facts in the Kelly Case may be distinguished in material respects from the facts in this case. Restricting the holding to the actual facts disclosed, that decision may be distinguished, although there is the definite statement in the opinion to the effect that receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois. In the Kelly Case, the money received was property of the King, which had been em-

bezzled, stolen, or fraudulently obtained through perjury and false statements made respecting the amount of concrete, lumber, bolts, etc., used in the construction of the new Parliament buildings at Winnipeg.

This distinction accounts for the language of the three sentences following the italicized portion of the Holmes opinion, above quoted, which fact should not be overlooked when construing the single sentence upon which appellants rely.

The nearest, or rather the least remote, Illinois statute to which our attention has been called, reads:

"Receiving. § 239. Every person, who, for his own gain, or to prevent the owner from again possessing his prop- [fol. 700] erty, shall buy, receive or aid in concealing *stolen goods*, or anything the *stealing* of which is declared to be larceny, or property *obtained by robbery or burglary*, knowing the same to have been so obtained, shall be imprisoned in the penitentiary not less than one nor more than ten years, or if such goods or other property or thing does not exceed the value of $15, he shall be fined not exceeding $1,000, and confined in the county jail not exceeding one year." (Cahill's Illinois Revised Statutes, Chapter 38, ¶ 507.)

The Illinois statute relied upon in the Kelly Case reads as follows:

"Every person who shall be a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance had, made or contrived, with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages, or who, being a party as aforesaid, at any time shall wittingly and willingly put in use, avow, maintain, justify or defend the same or any of them as true, and done, had or made in good faith, or upon good consideration, or shall sell, alien or assign any of the lands, tenements, hereditaments, goods, chattels or other things before mentioned, to him conveyed as aforesaid, or any part thereof, shall be fined not exceeding $1,000." (Cahill's Ill. Rev. Stats., Chap. 38, ¶ 294.)

Obviously it would be impossible to stretch either of these statutes to include one who receives money from another knowing that such other person obtained the money fraudulently.

Opinion evidence, offered by the contending parties before the Commissioner, of legal experts, who testified to the existence, as well as to the nonexistence, of an Illinois criminal statute covering the subject matter, was irrelevant. The existence of a state statute defining a crime can not be estabished by the opinion of Illinois lawyers, regardless of their high standing at the bar. Such statutes as exists speak for themselves. Their effect is for the court to determine. Equally far afield was the inquiry made of the same witnesses respecting the effect of the language of the Supreme Court, above quoted.

It is hardly necessary to speculate upon the reasons for the different commonwealths' (including Illinois) action in failing or refusing to make it a criminal offense to receive property knowing the same to have been fraudulently obtained. Whether the danger of abuse of such a statute (whereby the criminal prosecution is made an instrument [fol. 701] for the collection of a disputed civil liability) is not greater than the beneficial results incident to a conviction in a criminal prosecution of one who practices fraud in order to sell personal property, is for the legislative, rather than the judicial, branch of the Government to determine. In the instant case the search of counsel, as well as the search of the court, has satisfied me that Illinois has no statute making it a criminal offense to receive property knowing the same to have been fraudulently obtained. The offense charged not being a crime in Illinois, appellants have not brought their case within the terms of the treaty, which alone furnishes the basis for the proceedings in the District Court. The fact that there may be other offenses, such as conspiracy, which might be invoked, is quite immaterial. As pointed out in the majority opinion, the offense charged must (a) be one of the offenses covered by the treaty and (b) it (the offense charged) must be an offense against the laws of both countries. Wright v. Henkel, 190 U. S. 40.

The inquiry before the Commissioner, as before us, was an extremely narrow one. It is one which the court, not the witnesses, must decide. If an Illinois statute exists,

what is its wording? None having been found which would sustain a conviction for the offense charged, it follows that appellants have failed in their proof.

While it is highly desirable to give the treaty between the United States and Great Britain the most liberal construction possible to carry out its desired purpose, the courts of both countries have recognized the necessity of the extraditable offense being an offense against the demanding government and the commonwealth wherein the offender has taken his residence. It is not, therefore, for this court to attempt to broaden the terms of the treaty nor for us to make laws to apply to an individual case regardless of our sympathies. We must take the treaty as it is and apply it to the case at hand.

In passing, it may not be inappropriate to observe that any inclination to stretch the terms of the treaty against an alien who seeks refuge in this country vanishes when, and if it is made to appear that the counsel for, or the representative of, the demanding government misuses the treaty and makes of it a collection agency. I agree with the majority opinion in its conclusion that any abuse of the use of the treaty must be presented to the Secretary of [fol. 702] State and may not be accepted by this court on this appeal as the basis of a motion to dismiss. Yet such misuse of the treaty, if it be established, is utterly repugnant to the spirit of justice and to the enforcement of law and order, which, after all is said, is the background of all these extradition treaties.

It is hardly necessary to add, in view of what has been said, that I agree with the conclusion reached by Judge Carpenter.

[fol. 703] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING MOTION TO DISMISS—Oct. 15, 7932

It is ordered by the court that the motion to dismiss this appeal be, and the same is hereby, denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

4764

H. C. W. LAUBENHEIMER, UNITED STATES MARSHAL, and Godfrey Haggard, His Britannic Majesty's Consul General,

vs.

JOHN FACTOR, Described in the Extradition Proceedings as Harry Wise, alias J. Factor, alias Guest, alias J. Walker

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

JUDGMENT—Oct. 15, 1932

This cause came to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

[fol. 704] On consideration whereof, it is now here ordered and adjudged by this court, that the order of the said District Court in this cause appealed from, be, and the same is hereby reversed with costs to be recovered by the appellant, Godfrey Haggard, His Britannic Majesty's Consul General; and that this cause be, and the same is hereby remanded to the said District Court with direction to discharge the writ of habeas corpus and for further proceedings in consonance with the opinion of this court.

[fol. 705] [File endorsement omitted]

[fol. 706] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Title omitted]

PETITION FOR REHEARING—Filed Oct. 28, 1932

Comes now John Factor, appellee herein, and presents this, his petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

I

This Court has misapprehended the issue involved in the case of Kelly v. Griffin.

The majority opinion rendered in this cause by Mr. Justice Alschuler and concurred in by Mr. Justice Sparks is based upon a misapprehension of the issue before the [fol. 707] Supreme Court in Kelly v. Griffin, 241 U. S. 6. The majority of this Court at page 8, speaking of the Kelly v. Griffin decision, said:

"Enough for us to know that the Supreme Court, in a controversy *wherein that issue was directly involved*, definitely decided that receiving property, knowing it to have been fraudulently obtained, was criminal in Illinois. * * *" (Italics ours.)

Earlier on the same page, the majority opinion of this Court similarly misapprehended the charge made in the Kelly case when it said:

"Kelly was charged with a number of crimes against the laws of Canada, *'among them the very crime here charged.'*" (Italics ours.)

Applying that misapprehension of the issue in the Kelly case to the present case, the majority of this Court concluded in the next to the last paragraph of the opinion (p. 12.):

"Regarding as we do the decision in that case (Kelly v. Griffin) as here binding, we must and do conclude that the District Court erred in holding otherwise."

In the Kelly case the crime charged was not the receiving of money knowing it to have been fraudulently obtained but was the receiving of government money by Kelly from government officials knowing that they had obtained it from the government by fraud.

The exact language of the pertinent charge in the Kelly complaint, deleted of irrelevant material, was:

"that said Thomas Kelly * * * did also unlawfully receive money, valuable securities or other property *belonging to His Majesty the King* in the right of the Province

[fol. 708] of Manitoba which had theretofore been * * * fraudulently obtained by means of an unlawful and fraudulent conspiracy entered into between said Thomas Kelly, Sir Rodmond P. Roblin, *then and there Premier* of the Province of Manitoba, Walter H. Montague, *then and there Minister of Public Works*, James H. Howden, *then and there Attorney General*, George R. Coldwell, *then and there acting Minister of Public Works and Minister of Education*, R. M. Simpson, Victor W. Horwood, *then and there Provincial Architect*, * * * to defraud *His Majesty the King* in the right of the Province of Manitoba out of large sums of money * * *." (Italics ours.) (Page 41 of Printed Transcript of Record in the case of Kelly v. Griffin in the Supreme Court.)

This was the charge in the case and presented the only issue before the court—whether or not it was criminal in Illinois to receive public money theretofore fraudulently obtained by public officers.

The statutes set forth in the briefs of the demanding government related to this specific offense and did not cover the broader and general offense of receiving money knowing it to have been fraudulently obtained.*

The Canadian statutes relied upon were sections 347, 359 and 399 of the Canadian criminal code, which have to do with the receiving of government money theretofore fraudulently obtained by public officers.

The statutes relied upon by the demanding government in contending that the same offense was made criminal in [fol. 708a] Illinois likewise related specifically to receiving public moneys theretofore fraudulently taken by public officers.

Main reliance was placed upon Section 5497 of the Revised Statutes of the United States, which provides:

"*Every* * * * *person* not an authorized depository of public funds, *who knowingly receives from any* * * *

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*The argument made by the demanding government before the Supreme Court in the Kelly case as well as the statutory authorities cited in support thereof, were reprinted by us as Appendix B to Appellee's original brief herein pages 92 to 95.

agent of the United States any public money * * * otherwise than in payment of a debt against the United States * * * shall be punished * * *." (Italics ours.)

It was urged that this statute made the acts with which Kelly was charged in the complaint an offense for which he could have been held for trial in the federal courts in Illinois. Counsel for Kelly made no attempt to deny the applicability of this federal statute.

The demanding government's brief also set forth Section 167 of Chapter 38 of the Revised Statutes of Illinois, defining larceny, Section 74 of Chapter 38 defining embezzlement, Section 80 of Chapter 38 relating to embezzlement and fraudulent taking by public officers and Section 239 of Chapter 38 relating to receivers of property stolen or embezzled. This grouping of the statutes was apparently for the purpose of connecting the Illinois receiving statute with the Illinois statute relating to fraudulent taking of public funds by public officials.

These were the only statutes set forth in full by the demanding government. The Fraudulent Conveyance act, in spite of the assertions made concerning it by Judge Landis in his opinion in the Kelly case, was considered by counsel for the Canadian Government to have so little application [fol. 708b] that it was mentioned only in a parenthetical clause following the words "See also," without setting forth the language of the act and without any discussion of its pertinence.

Counsel in the Kelly case recognized that they had a very narrow issue before them, namely, is the receiving of government money which has been fraudulently obtained by public officials an offense in Illinois; and the language of Mr. Justice Holmes must be considered in the light of this narrow issue. There was no charge of receiving property (other than public property) knowing it to have been fraudulently obtained (by other than government officials). Counsel in that case, did not pretend that there was any such charge, and the opinion of the learned justice should not be interpreted as applying to any such charge.

Indeed these public officer and government fraud features of the charge in the Kelly case were definitely recognized by Mr. Justice Holmes, in the language on page 13 of the opinion where, in referring to the charge, he said:

"The complaint of October 15 charges * * * unlawfully receiving money and other property *of the King* which had been fraudulently obtained. * * *" (Italics ours.)

Again in the latter part of Mr. Justice Holmes' opinion, immediately following the phrase relied upon by the majority of this court as controlling here, the Justice stated (p. 15):

"There may be a doubt whether the appellant, if a party to the fraud, received the *money of the government*, directly from it, or through a third hand so as to be guilty *under this count of the complaint.*" (Italics ours.)

[fol. 709] It has, since the early days of Chief Justice Marshall, been recognized without exception that expressions in an opinion are to be limited to the issues before the court rendering the opinion. A statement in an opinion often is broader than it need be for the decision of the particular case, but such statement cannot be adopted as controlling in a subsequent case unless the issues are identical with those before the court in the former decision. This rule has become so well settled that it is customarily referred to as a maxim.

Cohens v. Virginia, 6 Wheaton 264, 399; 19 U. S. 264, 399.
United States v. Wong Kim Ark, 169 U. S. 649 at p. 678.
Weaver v. Palmer Bros. Co., 270 U. S. 402, 413.
The Jason, 225 U. S. 32, 53.
Bramwell v. U. S. Fidelity Co., 269 U. S. 483, 489.
Bailey v. Baker Ice Machine Co., 239 U. S. 268, 272.

In the case of Weyerhaeuser v. Hoyt, 219 U. S. 380, at page 394, the Supreme Court, in distinguishing the case of Sjoli v. Dreschel, 199 U. S. 564, on the ground of the maxim early announced by Chief Justice Marshall, said:

"If it be conceded that general language was used in the opinion in that case which *when separated from its context and disassociated from the issues* which the case involved, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohens v. Virginia, 6 Wheat. 399, so often since reiterated and expounded by this court, to

[fol. 710] the effect that 'General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, *but ought not to control* the judgment in a subsequent suit when the very point is presented for decision.'" (Italics ours.)

In the Kelly case, Mr. Justice Holmes made a broad statement in regard to the law of Illinois. That statement when disassociated from the balance of the opinion and from the issue presented to the court in that case, is not a correct statement of the law in Illinois.

When the whole opinion of Mr. Justice Holmes and the record are examined it appears that the court was concerned with an offense much more limited than the offense charged in the instant case.

The broad statement of Mr. Justice Holmes included the offense charged and covered the issues before the court, but did not and should not be here considered as having covered any matters which were not included in the complaint and were not presented by the issue in that case.

Obviously the issue here cannot be the same as that which was before the Supreme Court in the Kelly case, as there is no charge in the present case either that government money was taken or that any money was received from a public official. Neither the charge in the complaint nor the statutes cited to the court in the Kelly case cover the present offense, and the broad statement of Mr. Justice Holmes cannot be adopted as here controlling without a violation of the maxim which has been observed without exception since it was announced by Chief Justice Marshall in 1821.

[fol. 711] We devoted a considerable portion of our oral argument as well as of our written briefs presented to Judge Carpenter to an analysis of these points distinguishing the charge lodged in the Kelly case from the charge lodged in the instant case, and thereby demonstrating its inapplicability here. Judge Carpenter fully considered that analysis and made it the basis of his ultimate decision, as is shown in his written opinion.

This court in its majority opinion has quoted at length from portions of Judge Carpenter's opinion and yet seems

to have completely overlooked or disregarded that portion of Judge Carpenter's opinion which distinguished the charge in the Kelly case from the issue here presented. Judge Carpenter said (Appendix A, Appellee's Original Brief herein, pp. 85 to 97, R. 54 to 55):

"*When we come to consider the issues in that case* (Kelly v. Griffin), we find that *the crime charged* by the Canadian Government was one which made it an offense to receive money, knowing it *had been stolen from the Government, or a public official.*

"There were charges of perjury as well. Mr. Justice Holmes, after disposing of the matter of perjury, states:

" 'The last charge, "stealing or embezzling and receiving money fraudulently obtained," needs a word of explanation. It may be assumed that there is no evidence of larceny or embezzlement, as (commonly) defined, but the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois.'

"That is a very broad statement, *but it is subject to the limitation of the very issues which the Supreme Court had* [fol. 712] *before it. There was a crime committed in Canada,* so charged at least, *which was also a crime in the State of Illinois.* The receiving of money in the State of Illinois, knowing that it had been fraudulently obtained *from some public body or some public officer* having public moneys in his charge * * *, is made a crime under the laws of the State of Illinois.

"That the lawyers in that case recognized the situation, no stress was made of our Fraudulent Conveyance Act. They cited the Larceny Statute, the Embezzlement Statutes, the Receiving Statutes * * *. The only mention made of the Fraudulent Conveyance Act was one parenthetical statement in the brief of counsel for the Canadian Government. The reliance was placed *upon different statutes,* and *Mr. Justice Holmes,* in disposing of the case, when he used the language that 'the receiving of property known to have been fraudulently obtained, is a crime by the laws both of Canada and of Illinois' *must have meant on the facts in that case, money fraudulently obtained from or by a public official,* and received by some person knowing of that fraud." (Italics ours.)

Mr. Justice Evans, in his carefully reasoned dissenting opinion herein (p. 17) said that he agreed "with the conclusion reached by Judge Carpenter," and further correctly said (p. 14):

"The facts in the Kelly case may be distinguished in material respects from the facts in this case. Restricting the holding to the actual facts disclosed, that decision may be distinguished."

Mr. Justice Evans made these further pertinent observations (p. 14):

"Appellee has the right to ask, What is the Illinois statute which makes it an offense against the laws of Illi- [fol. 713] nois to do the acts with which he is charged? For appellants with commendable frankness admit that the offense charged was not a crime at common law. * * *.

"The offense charged against appellee, which apparently is a criminal offense in England, is at most a species of the genus—fraud. It exists, if at all, only because a statute makes it a criminal offense. Waiving to one side all rules which necessitate a strict construction of the criminal statutes, *the stubborn fact which confronts us is that no Illinois statute has been found which makes it a criminal offense to do the acts charged against appellee.* Counsel have not cited any statute, and the court has found none." (Italics ours.)

We respectfully submit that this court should upon further consideration conclude that the Kelly case does not control the decision of this case, and that, there being no statute in Illinois making criminal the acts here charged, the judgment of the District Court should be affirmed.

II

The Illinois Fraudulent Conveyance Act does not make criminal the acts charged in the complaint.

The court seems to have mistaken the scope of the Illinois Fraudulent Conveyance act, and the importance ascribed to that act by the case of Kelly v. Griffin. On page 9 of the majority opinion the statement is made:

"Undoubtedly the Supreme Court had before it the opinion of Judge Landis in the District Court, wherein he pointed out that the crime alleged was covered in Illinois by the Fraudulent Conveyance Act, section 294, c. 38, Rev. Stat. Ill.; and it seems to us that *in the broad sense* the acts [fol. 714] charged against Factor if committed in Illinois *might be* penalized under that section." (Italics ours.)

Although Judge Landis in his opinion referred solely to the Fraudulently Conveyance Act, counsel for the Canadian Government relegated that statute to 3½ lines thrown in parenthetically following the words "See also" after four pages of quotations and analyses of the federal and state statutes relating to government money received from a public officer.

It is inconceivable that Mr. Justice Holmes would have discarded the statutes set out in full by the demanding government in that case and would have adopted the statute relied upon by Judge Landis without citing Judge Landis's opinion or the Fraudulent Conveyance act as authority for his statements or otherwise pointing out that he was not relying upon the federal and Illinois statutes relating to receiving public funds from public officials.

A study of the charge in the complaint and of the briefs and the opinion in the Kelly case can lead to no conclusion other than that Mr. Justice Holmes was adopting the argument of counsel for the demanding government that under the federal statute and the Illinois statue, relating to fraudulent taking of public funds by public officers, the offense charged against Kelly was criminal in Illinois. The applicability of these statutes was not denied by counsel for Kelly in that case.

We pointed out in our original brief (pp. 41-49) why the Illinois Fraudulent Conveyance act did not make criminal the act charged in the complaint against Factor.

The majority of this court seem to have failed to comprehend the essential difference between a fraudulent conveyance and the receiving of property knowing it to have been obtained by fraud.

[fol. 714a] There is no allegation in the complaint that Factor was a party to a fraudulent conveyance, and as pointed out at page 45 of appellee's original brief, the es-

sence of the offense of receiving property knowing the same to have been fraudulently obtained is the previous obtaining of the property by the transferor through fraud. The essence of the offense under the Fraudulent Conveyance act is the fraud caused by the transfer of the property, not fraud in the obtaining of it by the transferor.

Again the majority of this court have failed to appreciate the effect of the repeal in 1925 of the penal provisions of the Fraudulent Conveyance act in England. (See Appellee's original Brief, p. 46.) If Factor were returned to England for an offense covered by our Fraudulent Conveyance act he could not be tried for such an offense because no such offense any longer exists under the laws of Great Britain.

Furthermore the offense covered by the Fraudulent Conveyance act is not covered by the treaty either in specific language or in spirit as it is not one of the crimes enumerated in the treaty, or in any of its amendments, and being only a minor misdemeanor is not the type of offense intended to be made extraditable. As pointed out in the case of United States v. Rauscher, 119 U. S. 407, 420, the framers of the treaty with Great Britain did not intend to permit extradition for an offense which is considered merely a minor misdemeanor in the state of asylum. That the Illinois Penal Fraudulent Conveyance act does cover only minor misdemeanors is settled by the case of Bernstein v. Bernstein, 11 Ill. App. 238, 241.

Judge Carpenter recognized the distinction between the Illinois Fraudulent Conveyance act and the offense charged [fol. 714b] by the complaint against Factor when he said (Appendix A, page 85 of Appellee's Original Brief, Rec. p. 53):

"That Statute does not make it a crime to receive money knowing it has been fraudulently obtained. There is no charge in the original proceeding before the Commissioner that Factor had been party to a fraud or had made any conveyance with the intent to defraud his creditors. The Fraudulent Conveyance Act on the Illinois Statute books punishes fraudulent conveyance having certain defined results. There is nothing that can be found there to indicate that a man who receives money, knowing it to have been fraudulently obtained, is intended to be included."

Mr. Justice Evans in his dissenting opinion also pointed out (p. 15) that it would be impossible to stretch that statute "to include one who receives money from another knowing that such other person obtained the money fraudulently."

III

The charge is not covered by any Illinois conspiracy statute.

At page 9 of the majority opinion the following statement is made:

"A number of other *allegedly* applicable sections are called to our attention by appellants, among them the Illinois conspiracy laws." (Italics ours.)

Neither in appellants' briefs nor in appellants' oral argument have we been able to find any reference to the Illinois conspiracy laws. The reason appellants' counsel did not cite such statutes is obvious, since conspiracy is not listed as one of the treaty crimes and the Supreme Court has definitely held that no crime is extraditable unless specified [fol. 715] in the treaties. The majority of this court also perceived that fatal difficulty in the conspiracy charge, even though erroneously attributing reliance on that statute to appellants' counsel, when this Court said (page 9):

"While it is true that *conspiracy is not one of the extraditable offenses specified in the treaties*, yet in practice the charge of conspiracy has been so broadened and amplified that, in effect, it includes and covers a multitude of sins, far beyond the limits of the old-time common law conspiracy. Broadly speaking, if the receipt from others of vast sums of money, with knowledge of the fraudulent manner whereby they were obtained, might be criminally reached in Illinois under its conspiracy laws, this would most likely answer the treaty requirements." (Italics ours.)

The complaint charged that "Factor * * * received from Broad Street Press, Limited, the sums * * * knowing the same to have been fraudulently obtained." The

complaint did not charge any conspiracy or agreement by Factor with any person or persons to defraud any party or to commit any other offense. It lacked the fundamental requirements of a conspiracy charge. In this connection we again refer to the langauge of Mr. Overmyer quoted at page 62 of appellee's original brief, wherein he stated that the British authorities "said that after a full consideration their judgment of the thing was that the only crime to charge him with was receiving money knowing the same to have been fraudulently obtained."

We respectfully submit that neither the offenses enumerated in the treaty nor the acts charged in the complaint can be treated in such a "broad sense."

[fol. 716] It is true that the treaty does not require that the names by which the crime is described in the two countries should be the same, nor that the scope of liability be co-extensive. It is enough if the offense charged in the extradition complaint is made criminal by some statute or the common law of the place where the accused is found. But the essentials of the crime charged must be made criminal in the state of asylum and it is not enough to say that one crime may be somewhat like another crime.

In the case of United States v. Rauscher, 119 U. S. 407, the Supreme Court in discussing the very treaty in question in this case, said (pp. 419-422):

"* * * The treaty not only provides that the party shall be *charged* with one of the crimes mentioned * * * but that the evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offense, and that *this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged.* * * *

"If upon the face of this treaty it can be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; *but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the*

treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the [fol. 716a] *country which permitted his extradition.* No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them. * * *"

"A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." (Italics ours.)

The trend towards "liberality" referred to by the majority of this court (p. 9) never has gone and cannot legally go beyond permitting the extradition where the essential ingredients of the offense charged are made criminal by some statute or common law prevailing in the state where the accused is found. None of the authorities cited and quoted from by the majority of this court as illustrations of such "liberality" (pp. 9 to 12 of said opinion) goes beyond this.

Illinois has never recognized the act charged in the complaint in this case as being a crime against the peace and dignity of the People of the State of Illinois.

IV

The motion to dismiss this appeal should have been sustained.

The appellant offered no evidence to contradict any charge contained in our motion to dismiss or in the suggestions and affidavit in support thereof.

[fol. 716b] In denying our motion this court seems to have assumed that it was based solely upon a misuse of the extradition treaty.

The misuse of the treaty was a ground submitted in support of the motion, and, as we shall hereinafter point out, was, we believe, in itself a sufficient reason for dismissing the appeal. It was, however, not the only reason advanced.

This court appears to have overlooked the fifth ground of the motion:

"5. That the *processes of this Court* and the United States District Court for the Northern District of Illinois *have been abused* by the British Government and its legal representatives and consular and diplomatic officers."

There has been more here than misuse of a treaty. There has been abuse of the judicial process of this very court and of the District Court for the Northern District of Illinois, Eastern Division. Counsel for appellants admit that this charge is true.

Must the federal courts bow to the State Department? Must they say, "We are being misused; a private individual is employing the judicial machinery provided for a criminal proceeding in order to collect for himself enormous attorneys' fees; he and the parties he represents are and have been committing frauds upon us, but we are powerless to protect our constitutional processes because it is a matter solely for the State Department to pass upon"?

A most flagrant instance of fraud committed upon this court occurred in the very presence of the three members of this court hearing this appeal.

[fol. 717] As stated in the motion to dismiss (p. 7), Mr. Overmyer, counsel for appellants, "said before the Honorable Judges of this court in chambers on May 23, 1932, that he had absolutely no connection with the civil case or any relationship to or control over the said Lee in that matter."

While not specifically set out in the motion to dismiss, this court will recall and take judicial notice of the fact that on the occasion of the two conferences held with the members of this court in chambers on May 23, 1932, we, as counsel for appellee, were protesting the fact that Mr. Overmyer had been present during numerous hearings before Judge Woodward in the civil case culminating on May 21, 1932, with the setting of the London depositions for June 8, 1932, and had rushed back to his office and served us with notice to advance the oral argument on this extradition appeal. It was in this connection that Mr.

Overmyer made the statement, now shown to be untrue, that he had no relationship whatsoever with the civil suit.

Our motion to dismiss points out (p. 5) that on that very day, May 23, 1932, there was in existence a signed contract dated January 6, 1932, under which Overmyer was to receive thirty per cent of whatever fees accrued in the civil case. In and by said contract the said Overmyer promised and agreed to cooperate "in every possible way" with the said Lee in carrying the civil litigation to a successful conclusion "by settlement or otherwise." This contract, the motion states (p. 5), consummated an arrangement made between Lee and Overmyer as early as May 23, 1931, "for mutual cooperation and for a division of any fees which should be received in the civil case." (p. 3.)

[fol. 718] Thus at the very moment when Mr. Overmyer was attempting to bring improper pressure on appellee in this case by speeding up the oral argument on appeal and thus force a more favorable settlement of the civil case in which he was expecting an enormous contingent fee, he categorically denied to the members of this court, as well as to counsel, that he had any connection with the civil case.

Our motion also stands unchallenged in its statement that Overmyer's contingent fee contract was known to the British authorities. None of these facts came to our attention in any provable form until but a short time before the motion to dismiss was filed.

We respectfully submit that this Court was in error in asserting (p. 3 of its opinion) that:

"The issue presented by the motion cannot be raised on habeas corpus, and surely not on an appeal therein.

"We are aware of those instances where, even on appeal, matters may be shown, such as release of errors or settlement of the controversy, whereby further prosecution of the appeal and decision thereon would be moot or futile. *But the motion does not present such a case.*" (Italics ours.)

In Dakota County v. Glidden, 113 U. S. 222, the Supreme Court admitted a certified transcript of proceedings of the Board of Commissioners of Dakota County to show a compromise which was being concealed from the Court and said (p. 225:)

"It is said that to recognize this compromise and grant this motion is to assume original instead of appellate jurisdiction.

"But this court is compelled, as all courts are, to receive evidence de hors the record affecting their proceeding in [fol. 719] a case before them on error or appeal. * * *

"*To refuse to receive appropriate evidence of such facts for that reason is to deliver up the court as a blind instrument for the perpetration of fraud, and to make its proceedings by such refusal the means of inflicting gross injustice.*" (Italics ours.)

In Kimball v. Kimball, 174 U. S. 158, the Supreme Court in referring to the Dakota County v. Glidden case said (p. 162):

"From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. Dakota County v. Glidden, ~~113~~ U. S. 222, 225, 226; Mills v. Green, 159 U. S. 651."

In F. A. Mfg. Co. v. Hayden & Clemons, 273 F. 374, the Circuit Court of Appeals for the First Circuit, in deciding a patent case, said (p. 378):

"If the Manufacturing Company is not the real owner of the patent, and of the right to prosecute the appeal, or purchased the right for *an ulterior purpose,* with a view to carrying on *vexatious litigation,* this court is not without power to make inquiry into such matters itself (Dakota County v. Glidden, 113 U. S. 222, 226, 5 Sup. Ct. 428, 28 L. Ed. 981; American Wood Paper Co. v. Heft, 131 U. S. Appendix, p. xcii; Board of Liquidation v. Louisville, 109 U. S. 221, 226, 3 Sup. Ct. 144, 27 L. Ed. 916; Bowden v. Johnson, supra; Ridge v. Manker, 132 Fed. 599, 67 C. C. A. 596; Lord v. Veazie, 8 How. 251, 121 L. Ed. 1067) * * *." (Italics ours.)

[fol. 720] That the fraud shown to exist by the facts stated in our motion to dismiss and not denied by the demanding government should result in the dismissal of the case in this court as fully as any other fraud contemplated by the

Supreme Court in the Dakota County v. Glidden case, supra, is shown by the language of the Court of Appeal in the case of Pooley v. Whethan, 15 Law Reports, Chancery Division, 435, where that court heard original evidence, because "there were circumstances leading at all events to a suspicion that the extradition had been obtained by the defendants for the purpose of bringing Mr. Pooley to this country in order that they might then have him within the jurisdiction of the court, so that they might attach him for that contempt."

Lord Justice James after making the above statement (p. 441), continued:

"Of course if that were so, if anything of that kind *amounting to an abuse of the process of the Court* were resorted to, independently of any Extradition Act or any other Act in the world, we should not have the slightest hesitation in discharging him from the attachment which had been so obtained, as we should from an attachment obtained *through any other fraud.* Therefore we desired to have the matter investigated." (Italics ours.)

It is the duty of this court to protect its process from the flagrant abuse shown to have been perpetrated in this instance.

This appeal we respectfully submit should be dismissed because of the fraud perpetrated upon this court and because of the abuse of this court's process as well as the abuse of the process of the United States District Court.

[fol. 721] Abuse of Extradition Treaty

In addition to the abuse of court process, this case presents an appalling perversion of an international extradition treaty.

As stated by the Supreme Court of the United States in the case of Grin v. Shine, 187 U. S. 181, 185:

"Care should doubtless be taken that the *treaty* be not made a *pretext for collecting private debts,* wreaking individual malice or forcing the surrender of political offenders." (Italics ours.)

The same doctrine has been repeated by our lower federal courts. The Circuit Court of Appeals for the fifth

circuit stated in Smith v. Government of Canal Zone, 249 Fed. 273, 279:

"Certainly a court should not allow itself to be made the instrument of *perverting the process of extradition to serve the purposes of a private litigant* who was instrumental in having that process resorted to with the object of having the extradited person subjected to a *civil liability,* instead of being tried for the crime with which he was charged. It is fairly to be inferred from circumstances disclosed that, if the procuring of the extradition was accompanied by a purpose to try the appellant on the criminal charge on which he was extradited, that purpose was a very *secondary one.*" (Italics ours.)

Again, in the case of In re Kelly, 26 Fed. 852, 854, it was stated:

"Whenever, in a case of a preliminary examination for a local offense, it is apparent that the same is carried on for the purpose of gratifying personal spite, or for the [fol. 722] annoyance and vexation of the party arrested, we think a court has power to take hold of it with a strong hand; and so in cases where proceedings are instituted under and by virtue of *treaty stipulations,* and it is apparent that the arrest is simply to gratify the personal malice of an individual, or of the *authorities of a foreign nation,* I have no question as to the *power and duty of the court* to lay strong hands upon those proceedings, and to *stop them altogether.*" (Italics ours.)

The Commissioner is given jurisdiction by statute to issue a warrant and hold upon a proper showing one accused of committing a crime in a foreign country in order that he may be surrendered for trial in the foreign country for the crime charged. (18 U. S. C. A. 651.)

The Commissioner is not given jurisdiction to issue a warrant and hold one charged with a crime in a foreign country in order that the accused may be forced to pay a private debt.

If it appears to the Commissioner hearing an extradition complaint that the treaty is being misused, it is his duty to dismiss the proceeding. If he should refuse to dismiss on such a showing, his ruling could be reviewed on habeas

corpus as a matter going to the existence of his jurisdiction.

If the facts as to abuse of the treaty or the extradition process are discovered after the hearing before the Commissioner and prior to a hearing on application for habeas corpus, the court hearing such petition should, on proper showing, grant the writ because of a failure of jurisdiction in the Commissioner.

If the abuses of the treaty are discovered during the pendency of an appeal from a decision granting the writ, [fol. 723] as in the instant case, it then becomes the duty of the Circuit Court of Appeals upon satisfactory showing of such facts to dismiss the appeal to that court.

The charge was made in our motion to dismiss that the extradition treaty between Great Britain and the United States had been used for the purpose of collecting private debts; that Franklin R. Overmyer, the attorney for the demanding government, had been using the treaty in an effort to collect money for himself as attorney's fees in the civil case therein mentioned as well as to collect alleged private debts for various British subjects.

The facts set forth in suggestions attached to the motion to dismiss further showed that the treaty was being misused while the matter was pending before Commissioner Walker as well as at all times subsequent thereto.

We respectfully submit, applying here the words of the court in the case of In re Kelly, supra, it is the "power and duty of the court to lay strong hands upon (these) proceedings, and to stop them altogether."

Conclusion

In view of the importance of the points above discussed, we respectfully urge that the court grant leave to appellee to orally argue this petition for rehearing; and

We respectfully pray that upon a consideration of the foregoing grounds, (and upon such an oral argument, if allowed) this petition for rehearing should be granted, and [fol. 724] this appeal should be dismised or the judgment of the District Court should be affirmed.

Respectfully submitted.

Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr., Allan J. Carter, Don M. Peebles, Counsel for Appellees

Certificate of Counsel

STATE OF ILLINOIS,
County of Cook, ss:

I, Rush C. Butler, one of the attorneys for the above named John Factor, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Rush C. Butler.

[fol. 725] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Title omitted]

PROOF OF SERVICE—Filed Oct. 28, 1932

UNITED STATES OF AMERICA,
Northern District of Illinois,
Cook County, ss:

Ferris E. Hurd, being first duly sworn, deposes and says that he is of lawful age, and that on the 28th day of October, 1932, he personally served the Petition for Rehearing of appellee herein by delivering to and leaving with Franklin R. Overmyer, their counsel, in the County of Cook, in the said District, three copies of said Petition for Rehearing.

Ferris E. Hurd.

Subscribed and sworn to before me this 28th day of October, A. D. 1932. My commission expires April 16th, 1932. Francis C. Robertson, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 726] [File endosement omitted]

[fol. 727] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ANSWER TO PETITION FOR REHEARING—Filed Nov. 8, 1932

Comes Now H. C. W. Laubenheimer, United States Marshal, and Godfrey Haggard, His Britannic Majesty's Con-

sul General, appellants, in response to the petition for a rehearing filed by appellee, and respectfully submit that no adequate reason is shown therein why a rehearing should be granted.

I

In such petition it is asserted that this Court misapprehend the issue involved in the case of Kelly v. Griffin. Appellants deny such assertion.

The petition contains little, if anything, additional to the argument heretofore made in appellee's original brief. [fol. 728] It is asserted by appellee's counsel that in the Kelly case (241 U. S. 6) the essence of the charge was that Kelly received money from government officials who had obtained it by fraud (p. 2 Petn. Rehg.) and counsel then proceed to quote a portion of the Consul's complaint in the Kelly case, deleting what they conclude is immaterial. With this we take issue. In the quotation recitals that the money belonged to the Government and that government officials were involved in the conspiracy are emphasized. Counsel's point utterly fails if the money which Kelly received did not come from government officials who had themselves personally committed the fraud and personally obtained the Government's money. Their argument is inconsistent with both the complaint and the facts. Counsel significantly omit a very important part of the complaint. After charging that Kelly received the Province's money which had been fraudulently obtained by means of a conspiracy between Kelly and government officials (naming them) the complaint reads: "by means of false and fraudulent contracts for extras in the construction by the firm of Thos. Kelly & Sons, of which firm the said Thos. Kelly was a member * * *, and by false and fraudulent estimates and statements of the amount of labor and material necessary to make the changes desired, and false and fraudulent and exorbitant values for the same, and that by means of such false and fraudulent scheme of fraud and deception, entered into, participated in and carried out by said parties, said Thos. Kelly & Sons, of which firm the said Thos. Kelly was a member, fraudulently and feloniously obtained" the Province's money in fraud of the

King and contrary to the laws of Manitoba (see p. 41 of U. S. Ct. Trans.—Kelly case).

Wherein does there appear any fact warranting the contention that Kelly received money from government [fol. 729] officials which they obtained by fraud? We challenge counsel to show any evidence of any payment by the Province to Government officials. We challenge counsel to show evidence of any abstraction of the Province's money by these officials. It is unthinkable that the officials in the conspiracy would blunder in this way and expose themselves to immediate detection. Thos. Kelly & Sons provided a convenient vehicle for transferring out of the Government treasury unearned sums of money a large portion of which was used in a political campaign in which the government officials were interested (Kelly Trans. p. 181). There clearly was no official who received the payments in an intermediate position. The wrongful act of the officials was in passing the false bills of Thos. Kelly & Sons and in permitting payment to that firm.

The record contains copies of checks drawn on the Province's bank account and payable to Thos. Kelly & Sons (Kelly Trans. p. 190-196). Commencing on this premise, which is the one supported by the complaint and the facts, it is apparent that opposing counsel's argument as to the statutes which they would like to assume Mr. Justice Holmes had in mind, collapses. It must be borne in mind that the complaint covered all the crimes enumerated in Group 3 of the Treaty of 1889—namely, larceny, embezzlement, and the receiving of money knowing it to have been embezzled, stolen or fraudulently obtained. Counsel for the demanding government in the Kelly case very consistently cited larceny and embezzlement statutes in confirmation of the charge of these crimes in the complaint. They were not cited as statutes shown to have been violated by the public officers. If that had been the theory, Kelly would have been charged with being accessory to their crime. But that was not the theory. Mr. Justice Holmes [fol. 730] ruled that there was no evidence as to these crimes and proceeded to hold that receiving money knowing it to have been fraudulently obtained is a crime by the laws of Illinois. He says that there may be a doubt whether Kelly received the money directly from the Government or through a third hand, so as to be guilty under

this count, but, he adds, "We are not prepared to pronounce his detention upon the count unjustifiable, in view of the finding." What prompted this was the evidence and the complaint wherefrom it appeared that Thos. Kelly and Sons were paid the money by the Province and Kelly was a member of that firm and necessarily received a share of these moneys. There was this circumstance attracting attention, i. e. that most of the false estimates were signed by Lawrence C. Kelly and not by Thos. Kelly himself. This was commented upon by Judge Landis (Appellee's Brief, Kelly case, p. 76,—Trans. 178). Kelly was not so far a party to the fraud as to exclude this charge. On a preliminary hearing, the government would certainly not be required to elect on which charge it would proceed. It is common practice to charge a defendant both as thief and as a receiver.

Factor's counsel (Petn. Rehg. p. 3) brazenly assert that the Canadian Statutes relied on were Sections 347, 359 and 399 having "to do with the receiving of government money theretofore fraudulently obtained by public officers." We challenge counsel to justify this representation to the Court as regards Secs. 347 and 399. Sec. 347 covers larceny and Sec. 399 covers receiving money obtained by any indictable offense, and contain no reference whatsoever to government officers.

We submit that the deposition of John Allen, deputy attorney-general, covering the law, is conclusive that it was not the government's theory that Kelly received money from public officers who had obtained it by fraud. Not one [fol. 731] statute cited by him makes the slightest reference to government officials. They are all of general application. His deposition quoted the statutes on theft, receiving of property obtained by any indictable offense, and conspiracy to defraud (Trans. 159). His deposition also covers the statute on false pretense (Trans. 128) and perjury. Mr. Allen gives his opinion that Kelly was guilty under the perjury, false pretense, theft and receiving statutes.

Counsel next assert (Petn. Rehg. p. 4) that in the Kelly case main reliance was placed upon Sec. 5497 of the United States Code. That statute provides that any person receiving a payment from a government disbursing officer otherwise than for a debt, is guilty of embezzlement. As to this statute, we desire to bring out that it does not penalize

governmental officers of any kind, but assuming it did, neither state officials, (the equivalent of Provincial officials) nor anyone receiving money from a State otherwise than in payment of a debt, could possibly be covered by this Federal statute. If this Federal statute of limited application, not applying to all governmental bodies, is sufficient for the purpose of an extradition inquiry, by the same token we believe the Federal statutes cited in our briefs are applicable, particularly the one making criminal the receiving of money knowing it to have been feloniously taken. This Federal statute would not be "by the laws of Illinois" as expressed by Mr. Justice Holmes.

Let us further point out as to Section 5497, that nowhere is there any requirement that the disbursing officer must be party to the crime. Even if he were guilty, he could not be punished under that Statute. The disbursing officer on the other hand might be entirely innocent and still one who would receive money knowing he was not an authorized depositary and not entitled to it in payment of a debt, would [fol. 732] be guilty. Such a person is not punished as one receiving money knowing it to have been fraudulently obtained. He is punished for embezzlement, but as Mr. Justice Holmes says, there was no evidence of embezzlement as commonly defined, and this statute was precisely what he had in mind when making that statement.

The argument of the Federal Statute is in perfect negation of the argument that it was the Illinois embezzlement statute covering public officers which it is contended Mr. Justices Holmes had in mind. The outstanding guide to what the Supreme Court had in mind is the holding of the lower Court which it was reviewing. We feel that beyond peradventure of a doubt had Mr. Justice Holmes approved Judge Landis' ruling, but dissented from his reasoning, he would have said so. The efficacy of an appellate court opinion as a precedent would be lost if it failed to point out errors in the lower Court's opinion. An improperly reasoned opinion, left to confuse and misguide by the appellate Court's failure to challenge it, is productive of great mischief. In this particular case, as pointed out by Judge FitzHenry this opinion of Judge Landis was notice to Great Britain that a certain legal situation exists, and it is such a legal situation as gives the demanding government certain rights.

Opposing counsel again refer (Petn. Rehg. p. 4) to the state statute on embezzlement and fraudulent takings by public officers, which Illinois statute was the one Judge Carpenter presumed Mr. Justice Holmes had in mind. As we pointed out in our original brief there is an exact counterpart to this statute covering private peculations which would apply to the original wrongful takings by the Broad Street Press and its agents. The Illinois statute [fol. 733] on receiving would then be applicable to make Factor guilty.

We do not feel called upon to distinguish the cases cited (Petn. Rehg. p. 6), pertaining to the binding effect of Mr. Justices Holmes' opinion. His ruling on the Illinois law was essential before Kelly could be extradited on the particular charge. It was limited to the precise issue before him, and is therefore conclusive. It is distinguishable from the cases cited by counsel in that in those cases the general expressions which were held not binding went beyond the issue and were dicta, and were so characterized by the respective courts when distinguishing the prior ruling.

II

The contention is made that the Fraudulent Conveyance Act does not cover the crime in question. We assert that it does.

As opposed to counsel's view, we believe it entirely plausible that Mr. Justice Holmes disregarded the statutes in the brief of the demanding government, which he felt inapplicable and applied the statute cited by the lower Court whose opinion he was reviewing. He disregarded the contention of the counsel that embezzlement and larceny had been committed. We feel that the irreconcilable fact remains that he was reviewing a decision of a District Judge based upon the Fraudulent Conveyance Statute. We are at loss to understand why this does not remove all right to speculate as to what statute Mr. Justice Holmes had in mind.

Had the essence of the Kelly case been that the money was that of the government, the statute which would have been decisive of the question was Section 104, Title 18 U. S. Criminal Code, which penalizes the receiving of money or [fol. 734] property belonging to the Federal Government

knowing it to have been embezzled, stolen or purloined. This statute was not considered by the Court or counsel, because it was inconsistent with the theory advanced by the demanding government. To us it seems inconceivable to contend that public officials could be charged with stealing or embezzling government moneys when the record shows that the money was paid out to a contracting firm upon false estimates presented by that firm.

Factor's counsel hark back to Judge Carpenter's opinion that the fraudulent conveyance statute does not make it a crime to receive money knowing it to have been fraudulently obtained. Let us analyze that.

Under both statutes there are three parties involved. Under the English statute there is the defrauded person, the defrauder and the receiver. Under the Illinois statute there is the defrauded person, the defrauder who is liable to the former, and the receiver who knows of the circumstances. As applied to a state of facts where property has been obtained by false pretense, we fail to perceive any difference between the two statutes. Every case coming under the English statute of necessity constitutes a violation of the Illinois statute. The converse admittedly is not true. We do not understand how it can be reasonably contended that one who obtains property from another by false pretense and then puts it out of the reach of the defrauded person by turning it over to another, has not violated the Illinois statute, and that statute makes the receiver of the property also liable. As we view the law, it is immaterial for the purposes of this hearing whether the Court believes that there was an intended fraudulent conveyance in the transfer by the Broad Street Press and its officers of the [fol. 735] money conveyed to Factor At best, this Court is only dealing with the possibility of such. Even upon a trial of the actual issue a jury would be at liberty to convict the accused where the facts which make it a crime are known to him. Judge Fisher, presented by Factor's counsel as an expert witness, admitted that the Fraudulent Conveyance Statute could be applied. In our view no additional act of any kind is required to make the receiver liable under the Illinois Act, if it appears that he has received money knowing it to have been fraudulently obtained.

III

Appellee contends the charge is not covered by any Illinois Conspiracy Statute. We assert it is.

Factor's counsel take exception to the reference by this Court to the Conspiracy Statute, it being charged that we did not refer to this statute, either in oral argument or in the brief. Counsel are evidently forgetful. The very purpose of devoting a substantial portion of our brief to the Gaynor and Greene cases (146 F. 766; 154 F. 401) was to point out that these fugitives were surrendered by Canada for participation in fraud by an agent, participation in embezzlement and receiving money knowing it to have been fraudulently obtained. On their return to the U. S. they were charged with conspiracy, which the Court held sufficiently akin to the crimes for which they were surrendered, as to be perfectly legal, and the defendants' objection that they were tried for a different crime was overruled. It will be recalled that Judge Spear was affirmed by the Circuit Court of Appeals and the Supreme Court refused to review the matter. We certainly emphasized the fact that there being this latitude in reshap- [fol. 736] ing the charges on the fugitive's return, the same rules which would determine that a different crime was not being charged, would apply in the asylum country on the question whether there existed a crime substantially similar to that which the fugitive is charged with having violated. In that connection we said on p. 116 of our original brief that Factor could unquestionably be tried in Illinois for a conspiracy.

In considering the question whether or not the acts charged are criminal under the asylum law, it seems apparent that the complaint which charges a treaty offense need not charge the crime of the asylum by name or otherwise. We feel that the conspiracy statute, as well as the other state and Federal statutes are competent and requisite guides showing that the acts charged against Factor are criminal here.

On page 14 of the petition for rehearing Factor's counsel quote a statement made by Mr. Overmyer as regards the crime charged against Factor. An examination of this statement shows no admission that Factor has not committed and could not be charged with other crimes than the

one in question. But the Public Prosecutor selected the particular charge as the one most feasible upon which to try Factor.

U. S. v. Rauscher, 119 U. S. 407 cited by counsel (p. 15 Petn. Rehg.) involved the prosecution of a returned fugitive on a crime different from that for which he was extradited. The new charge was not even a treaty crime and obviously violated the treaty.

[fol. 737] IV

The alleged misuse of the treaty is a question for the Political Department.

This Court was unanimous in concluding that the question raised by the motion to dismiss was one for decision by the political rather than the judicial branch of the government. Counsel have cited no authorities to rebut this.

The case of Grin v. Shine, 187 U. S. 181, 185, cited by Factor's counsel, is not out of harmony with the Court's view. The care that should be taken to see that the treaty is not made a pretext for collecting private debts or wreaking individual malice is to be exercised by the political department. An extradition proceeding regularly instituted by the constituted authorities of the demanding government certainly is not to be viewed with suspicion by the Courts with the proceeding descending into a clash between the nations and the offender being forgotten. The same high purpose animating the governments in the promulgation of treaties must be presumed by the Courts to exist in all proceedings taken thereunder. No doubt any citizen of this government would have the right to bring to the attention of the secretary of state an infraction of the treaty for such action as he saw fit to take, but not with the idea of liberating one duly charged with crime. The crime of the fugitive is not purged by another wrong.

In adhering to the position that this Court has no jurisdiction to pass upon an alleged abuse of the treaty, the demanding government does so in order to avoid a mischievous precedent, after which every fugitive would find it advantageous to put the demanding government on trial. [fol. 738] Furthermore, the delay incident to such an inquiry ought to be avoided. Were such a hearing to take

place evidence would have to be produced from Washington and London, which if taken would, however, conclusively show that Factor's counsel never labored under any misapprehension that they could truckle with the demanding government by settling the civil suit.

There is a phase of the charge quite apart from the government's right to receive Factor and from its immunity from trial at his instance, which it is hoped the Court will consider in a separate hearing. It involves the charges made by Factor's counsel against the writer of this brief. It is said that counsel for appellants (meaning Mr. Overmyer) admits that the processes of the Court have been abused. For the sake of a legal argument on the motion to strike, he admitted the facts of the motion well pleaded. He certainly did not admit that the facts alleged warranted counsel's conclusion that the treaty had been misused or the Court's process abused. Moreover, he does not admit that the facts as charged by opposing counsel are true.

Not even momentarily would he contend that the Court is without power to inquire into the actions of a member of its bar. To demonstrate to the Court that there have been no distasteful aspects in his conduct of the extradition case by reason of an interest in the civil suit, he craves the opportunity to answer any and all questions. It is of transcendent importance to him that there shall not be permanently inscribed on the records of this Court the intimation that he acted improperly. Had he suspected that any of the members of this Court seriously questioned the propriety of his actions, he would at the time of the oral argument respectfully have insisted that the Court inquire into [fol. 739] the matter. This Court will remember that he did at the time offer to explain his position in detail if the Court cared to have him do so.

The conduct of Mr. Overmyer, having been questioned particularly in a dissenting opinion upon what we conceive are unwarranted allegations and conclusions made by the opposing counsel, it is deemed not inappropriate for Mr. Overmyer to make a personal statement explaining in some detail the proof which will be offered if opportunity is afforded in a separate proceeding, fully explaining his conduct. This statement appears as an appendix to this brief and is sponsored by Mr. Overmyer alone.

Under the treaty, the demanding government is entitled to the return of the loot and the criminal. Certainly that contemplates that the government through some counsel shall look after the matter. If it can consistently be done in this way, how does there arise any inconsistency merely because the same counsel representing the government is interested in a proceeding instituted by the injured persons in their own behalf? Let us suppose a simpler case where, for instance, a fugitive from Canada brings into this country an automobile which he has obtained by false pretenses. Shall it be said that the government may take no steps to retrieve the car as well as the criminal? Shall it be said that the same counsel may not act in both phases of the matter? The question is not that counsel acts in a dual capacity, but how he acts. If he bargains in any way with the fugitive, his conduct is reprehensible. But even then, that would not remove the obligation to extradite where the evidence shows probable cause to believe a crime has been committed. An extradition case is not criminal in its nature. Even the misuse of his office by a district attorney, which is a much different case, most certainly would [fol. 740] not exonerate a criminal whose guilt is established. That the district attorney is using his office to collect money may have some bearing on the credibility of evidence adduced to establish guilt, but the sovereign right of the people to have a criminal punished cannot thus be lost.

It is not an uncommon practice in the state courts for an attorney whose client has been wronged by the criminal action of another to seek a warrant for the arrest of the accused. At the trial itself, the Court at times allows the private attorney to assist in the prosecution, and at the very time a civil suit may be pending against the accused.

For the reasons hereinbefore set forth, we believe that the petition for a rehearing should be denied.

Respectfully submitted.

Franklin R. Overmyer, Adelor J. Petit, Jr., John G. Drennan, Attorneys for Appellants.

[fols. 741 & 742] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Title omitted]

NOTICE OF MOTION—Filed Nov. 10, 1932

To Franklin R. Overmyer, Esq., Adelor J. Petit, Jr., Esq., 33 South Clark Street; John C. Drennan, 100 West Monroe Street, Chicago, Illinois:

Please take notice that on Thursday, November 10, 1932, at 9:30 o'clock A. M., or as soon thereaster as counsel may be heard, we shall appear before the United States Circuit Court of Appeals for the Seventh Circuit, in the courtroom usually occupied by them, or in such other room as they may be sitting, in the Federal Building, Chicago, Illinois, and then and there present a motion on behalf of John Factor, appellee herein, for a determination by the Court of the factual issues tendered under Point IV and the Appendix of appellants' answer to appellee's petition for rehearing, and for leave to present evidence upon said issues.

At which time and place you may appear if you so see fit.

Rush C. Butler, Allan J. Carter, S. O. Levinson, G. Gale Gilbert, Jr., Don M. Peebles, Counsel for Appellee.

Received a copy of the above and foregoing notice this 9th day of November, A. D. 1932.

Franklin R. Overmyer, Adelor J. Petit, Jr., John G. Drennan.

[File endorsement omitted.]

[fol. 743] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Title omitted]

MOTION OF APPELLEE FOR DETERMINATION OF FACTUAL ISSUES TENDERED UNDER POINT IV AND APPENDIX OF APPELLANTS' ANSWER TO PETITION FOR REHEARING AND FOR LEAVE TO OFFER EVIDENCE UPON SAID ISSUES—Filed Nov. 10, 1932

Now comes John Factor, appellee herein, by his attorneys, and moves this Court to judicially determine the

factual issues tendered under Point IV and the Appendix of appellants' Answer to the Petition for Rehearing heretofore filed in this cause by appellee, and further moves the Court to hear oral testimony and documentary evidence upon behalf of appellee in support of the issues presented by said Point IV and the Appendix of Appellants' said Answer, and by the motion of appellee to dismiss this appeal; and in support of this motion shows to the Court that:

[fol. 744] 1. Although the matters and things set up in the motion of appellee herein to dismiss the appeal were considered by the Court upon a demurrer ore tenus, appellants have seen fit in their Answer to the Petition of the appellee for Rehearing of this cause to submit to this Court the matters and things raised by said motion to dismiss upon their merits through an attempt to controvert the facts upon which said motion to dismiss was based. They thereby have reversed their position taken on the demurrer ore tenus and have waived all objection to the exercise of the right and duty of this Court to determine the issues thereby presented.

2. It thereupon becomes the duty of this Court, upon the issues presented by said motion to dismiss and by said Answer to the Petition for Rehearing, to judicially determine said factual controversies as well as to reconsider the legal effect of the misuse of the treaty and abuse of judicial process, if and when that misuse and abuse are established by competent evidence upon such a judicial inquiry.

3. Appellants have in and by said Point IV and Appendix tendered said factual issues and have reflected upon the integrity of several, if not all, of counsel representing appellee in this proceeding, and it is therefore respectfully submitted that every opportunity should be afforded said appellee and his counsel as officers of this Court to meet and refute all matters and things contained in said Point IV and the said Appendix, and to establish the facts set forth in Appellee's Motion to Dismiss this Appeal. The alleged version of facts set out by counsel for appellants in Point IV and said Appendix consists substantially of untruths and deceptive half-truths all dehors the record, all of which appellee stands ready and willing to refute.

[fol. 745] 4. As pointed out in the petition of appellee for a rehearing of this cause, misuse of the treaty and abuse of process of the Court is a matter which this Court should properly determine upon a full and complete hearing thereon, and this contention is recognized and the matter tendered to the Court for determination by appellants in their voluntary presentation of their alleged version of the facts, in which tender we hereby join.

5. Said Answer of appellants to the petition for rehearing of appellee was not filed in this cause within the time period specified under the rules of this Court, and did not come to the attention of the appellee until 9:30 A. M. on November 9, 1932. Appellee is taking this first opportunity to join in the request made to this Court to hear evidence and determine the factual issues presented by said motion to dismiss and said Point IV and the Appendix of said Answer, but submit to this Court that said inquiry, evidence and judicial determination of said factual controversies should be determined in this habeas corpus proceeding and not in any other separate or distinct hearing because said factual controversies directly relate to the question of appellee's right to a rehearing of this cause.

All of which is respectfully submitted.

Rush C. Butler, Rush C. Butler, S. O. Levinson, S. O. Levinson, G. Gale Gilbert, Jr., G. Gale Gilbert, Jr., Allan J. Carter, Allan J. Carter, Don M. Peebles, Don M. Peebles, Counsel for John Factor, Appellee.

[fol. 745½] [File endorsement omitted.]

[fol. 746] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MINUTE ENTRY—Nov. 10, 1932

Now this day come the parties by their counsel and counsel for appellee present a motion that the court determine the factual issues tendered under point IV and the Appendix of appellants' answer to petition for rehearing, and for leave to offer evidence upon said issues. The said mo-

tion having been submitted, the court takes this matter under advisement.

[fol. 747] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER CORRECTING DISSENTING OPINION—Nov. 15, 1932

It is now here ordered that the next to the last paragraph of the dissenting opinion by Judge Evan A. Evans, in this cause be, and the same is hereby corrected and amended so as to read as follows:

"In passing, it may not be inappropriate to observe that any inclination to stretch the terms of the treaty against an alien who seeks refuge in this country vanishes when and if it be made to appear that the counsel for, or the representative of, the demanding government misuses the treaty and makes of it a collection agency. I agree with the majority opinion in its conclusion that any abuse of the use of the treaty must be presented to the Secretary of State and may not be accepted by this court on this appeal as the basis of a motion to dismiss. Yet such misuse of the treaty, if it be established, is utterly repugnant to the spirit of justice and to the enforcement of law and order, which, after all is said, is the background of all extradition treaties."

[fol. 748] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STRIKING CERTAIN MATTER FROM PETITION FOR REHEARING AND ANSWER THERETO—Nov. 15, 1932

It appearing that the matters and things contained in the "appendix" to appellants' answer to the petition for rehearing herein have no relevancy to any issue before this court,

It is ordered that said "appendix", comprising printed pages numbered 15 to 29 inclusive of said answer, be at

once physically eliminated and removed from said answer and from the files in the cause.

It is further ordered that there be deleted from the petition for rehearing herein the sentence "These charges are not denied by appellants," as it appears at the end of the first complete paragraph on page 24 of said petition for rehearing; and also the sentence "These facts are not denied by appellants," as it appears at the end of the second complete paragraph of said page 24 of said petition for rehearing.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—Nov. 15, 1932

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

[fol. 749] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR STAY OF MANDATE—Filed Nov. 16, 1932

Now on this 16th day of November, A. D. 1932, comes the Appellee, John Factor, by his attorneys, Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr., Allan J. Carter and Don M. Peebles, and shows to the court that the Appellee herein intends to seasonably file in the Supreme Court of the United States a petition for a writ of certiorari in the above entitled cause;

Therefore the Appellee herein prays that this Court enter an order staying the mandate of this Court to the United States District Court, for the Northern District of Illinois, Eastern Division, in this cause, until the further order of this court.

Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr., Allan J. Carter, Don M. Peebles.

[File endorsement omitted.]

[fol. 750] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE—Nov. 16, 1932

Now this day comes counsel for appellee and presents a motion for a stay of the mandate of this court pending a petition to the Supreme Court of the United States for a writ of certiorari.

On consideration whereof: It is now here ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for appellee proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and, upon the filing of said petition file in this court proof of the filing of said petition in said court.

[fol. 751] IN UNITED STATES CIRCUIT COURT OF APPEALS, OCTOBER TERM, A. D. 1932

No. 4764

[Title omitted]

NOTICE OF MOTION—Filed Dec. 21, 1932

To Franklin R. Overmyer, Esq., Adelor J. Petit, Jr., Esq., 33 South Clark Street; John G. Drennan, Esq., 100 West Monroe Street, Chicago, Illinois:

Please take notice that on Wednesday, the 21st day of December, A. D. 1932, at 10 A. M., or as soon thereafter as counsel may be heard, we shall appear before the United States Circuit Court of Appeals for the Seventh Circuit, in Judge Alschuler's Chambers, or in such other room as they may be sitting, in the Federal Building, Chicago, Illinois, and then and there present a motion on behalf of John Factor, appellee herein, for leave to file instanter his Motion to vacate and set aside all orders and opinions of this Court entered and filed herein October 15, 1932, and

thereafter, and to dismiss the appeal herein, a copy of which said motion is attached hereto.

[fol. 752] At which time and place you may appear if you so see fit.

Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr., Allan J. Carter, Don M. Peebles, Counsel for Appellee.

Received a copy of the above and foregoing notice and a copy of said motions thereto attached this 20th day of December, A. D. 1932.

Franklin R. Overmyer, Adelor J. Petit, Jr., John G. Drennan.

[File endorsement omitted.]

[fol. 753] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Title omitted]

MOTION FOR LEAVE TO FILE MOTION TO VACATE—Filed Dec. 21, 1932

Now on this 21st day of December, A. D. 1932, comes John Factor, appellee herein, by his attorneys, Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr., Allan J. Carter and Don M. Peebles, and moves the Court for leave to file instanter his Motion to vacate and set aside all orders and opinions of this Court entered and filed herein October 15, 1932, and thereafter, and to dismiss the appeal herein, and shows in support thereof a copy of said verified Motion attached hereto and made a part hereof.

Rush C. Butler, Rush C. Butler, S. O. Levinson, S. O. Levinson, G. Gale Gilbert, Jr., G. Gale Gilbert, Jr., Allan J. Carter, Allan J. Carter, Don M. Peebles, Don M. Peebles, Counsel for John Factor, Appellee.

[fol. 754] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Title omitted]

MOTION TO VACATE AND SET ASIDE CERTAIN ORDERS AND OPINIONS ENTERED HEREIN AND DISMISS THIS APPEAL—Filed Dec. 21, 1932

Now on this 21st day of December, A. D. 1932, comes John Factor, appellee in the above entitled cause, by his attorneys, Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr., Allan J. Carter and Don M. Peebles, and moves the Court to vacate and set aside all orders and opinions of this Court entered in this cause on the 15th day of October, A. D. 1932, and thereafter, and to dismiss the appeal of H. C. W. Laubenheimer, United States Marshal for the Northern District of Illinois, Eastern Division, and Godfrey Haggard, His Britannic Majesty's Consul General, herein, and shows to the Court in support of this Motion the following:

[fol. 755] 1. That this Motion is based upon the fact that on August 19, 1932, while this appeal was pending and undetermined, all extradition treaties between the United States and Great Britain theretofore existing ceased to be of any force or effect in the United States, and a new and different extradition treaty between said nations became operative.

2. That the complaint upon which the extradition proceedings were based, filed before United States Commissioner Walker on the 25th day of May, 1931, and set out as Exhibit "C" to the petition for habeas corpus herein, (Rec. pp. 12, 13), was filed under and by virtue of the terms and provisions of Article X of the Treaty between the United States and Great Britain of 1842, and the Supplemental Conventions of 1889, 1900 and 1905.

3. That the mittimus (Rec. pp. 8, 9) issued by United States Commissioner Walker on the 12th day of January, 1932, based upon said complaint seeking extradition of John Factor to Great Britain, was issued under and by virtue of the terms and provisions of said Article X of the

treaty between the United States and Great Britain entered into on the 9th day of August, 1842, and said Supplemental Treaties.

4. That it was from said mittimus described in Paragraph 3, supra, that the United States District Court ordered the discharge of appellee.

5. That the jurisdiction and authority of said United States Commissioner to issue said mittimus and the velad- [fol. 756] ity thereof was dependent upon the provisions of the said Article X of the Treaty of 1842 and the Supplemental Treaties thereto, hereinabove mentioned, together with the provisions of Chapter 20, Title 18, United States Code Annotated.

Section 651 of Chapter 20 of Title 18, United States Code Annotated, provides as follows:

"*Fugitives from foreign country. Whenever there is a treaty or convention for extradition* between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, or commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, *charging any person found within the limits of any State,* District, or Territory, with having committed within the jurisdiction of any such foreign government *any of the crimes provided for by such treaty or convention,* issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. *If, on such hearing he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same,* together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, *for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail there to remain until such surrender shall be made.* (R. S. § 5270; June 6, 1900, c. 793, 31 Stat. 656.)" (Underscoring ours.)

6. That this Court definitely found that the sole basis and authority for the extradition proceedings and the issuance and validity of said mittimus issued by Commissioner Walker was found in Article X of the Treaty of 1842, and the Supplemental Convention of 1889. The ma-
[fol. 757] jority of this Court stated this proposition at page 4 of their opinion in the following language:

"The treaty provisions involved are Article X of the 'Webster-Ashburton' Treaty of 1842, and Article I of the 'Blaine-Pauncefote' Treaty of 1889."

7. That on the 22nd day of December, 1931, an extradition treaty between the United States and Great Britain was signed in London, England; on February 19, 1932, ratification of such extradition treaty was advised by the Senate of the United States; on March 3, 1932, said extradition treaty was ratified by the President of the United States; on July 29, 1932, said extradition treaty was ratified by Great Britain; on August 4, 1932, said ratifications between the United States and Great Britain were exchanged at London, England; on August 9, 1932, said extradition treaty was proclaimed by the President of the United States and said Treaty by its own terms became effective on August 19, 1932.

Said extradition treaty, in and by the terms of Article 18 thereof provides:

"On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and of the supplementary Convention of the 12th April, 1905, relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other treaty arrangements."

A copy of said Extradition Treaty of 1932, as printed by the United States Government Printing Office at Wash-
[fol. 758] ington, is attached hereto and hereby expressly made a part hereof.

8. That said mittimus, from which release was ordered by the District Court in this habeas corpus proceeding, on the 19th day of August, 1932, became a nullity and ceased to have any validity, force or effect by reason of the fact that the treaties under which it was issued, by said 1932 treaty agreement of the United States and Great Britain, ceased to have any force or effect.

9. That in and by the terms of Article 3 of said Extradition Treaty of 1932 the charge of "receiving money knowing the same to have been fraudulently obtained" is not enumerated as an extraditable offense. The said Treaty of 1932 is the only existing treaty between the United States and Great Britain on the subject of extradition, and said mittimus issued to detain the appellee herein on such charge has been rendered void.

10. That the existence of said Extradition Treaty of 1932 was not known to the appellee or any of his attorneys until Tuesday, December 13, 1932, and appellee hereby takes the earliest opportunity to call the attention of this Court to the fact that the treaty under which his detention for extradition has been sought and said mittimus so issued ceased to have any force and effect on and after August 19, 1932, which was long prior to the date of the decision of this Court in this case.

11. That by virtue of the revocation of Article X of the Treaty of 1842, and the whole of the treaties of 1889, 1900 and 1905, on August 19, 1932, this Court, prior to its [fol. 759] opinion and order in this cause, ceased to have jurisdiction of the appeal herein.

12. That said treaties under which application for appellee's extradition was sought, and under which said mittimus was issued, were not in existence on the 15th day of October, 1932, when this Court rendered its decision and entered its order in this cause; and that said decision and order were entered under the misapprehension on the part of members of this Court, the appellee herein, and each of his counsel that said treaties were still in full force and effect, when, in fact, they were not. The order and decision of this Court as to whether or not the appellee was held under a valid mittimus for extradition, presuming the existence of said treaties, should be set aside, as based upon

an erroneous view of the law and treaties then in existence, applicable to said mittimus, the extradition proceeding and this cause. Said appeal should therefore be dismissed as an appeal from an order of discharge from a mittimus based upon a treaty which, although in effect at the time of the order of discharge, by agreement of the United States and Great Britain, and by operation of law, had ceased to be in effect and had become wholly null and void prior to the decision of this Court on appeal.

Wherefore appellee prays that the order of this Court entered on the 15th day of October, A. D. 1932, and all subsequent orders relating thereto, and the opinions of this [fol. 760] Court filed herein be vacated, set aside and withdrawn and the appeal herein wholly dismissed, and that this Court enter such other and further orders herein as justice shall require and to this Court shall seem meet.

Rush C. Butler, Rush C. Butler, S. O. Levinson, S. O. Levinson, G. Gale Gilbert, Jr., G. Gale Gilbert, Jr., Allan J. Carter, Allan J. Carter, Don M. Peebles, Don M. Peebles, Counsel for John Factor, Appellee.

[fol. 761] *Duly sworn to by Allan J. Carter. Jurat omitted in printing.*

[fol. 762] Treaty, Series No. 849

Extradition

Treaty Between the United States of America and Great Britain

Signed at London December 22, 1931.

Ratification advised by the Senate of the United States February 19, 1932 (legislative day of February 17, 1932).

Ratified by the President of the United States March 3, 1932.

Ratified by Great Britain July 29, 1932.

Ratifications exchanged at London August 4, 1932.

Proclaimed by the President of the United States, August 9, 1932.

and

Exchanges of Notes Extending the Applicability of the Treaty to Palestine and Trans-Jordan

Department of State, United States of America

United States Government Printing Office
Washington: 1932

[fol. 763] By the President of the United States

A Proclamation

Whereas an extradition treaty between the United States of America and Great Britain was concluded and signed by their respective Plenipotentiaries at London on December 22, 1931, the original of which treaty is word for word as follows:

The President of the United States of America and His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, desiring to make more adequate provision for the reciprocal extradition of criminals, have resolved to conclude a Treaty for that purpose, and to that end have appointed as their plenipotentiaries:

The President of the United States of America: General Charles G. Dawes, Ambassador Extraordinary and Plenipotentiary of the United States of America at the Court of St. James;

And His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, for Great Britain and Northern Ireland: The Right Honourable Sir John Simon, G. C. S. I., M. P., His Principal Secretary of State for Foreign Affairs;

who, having communicated their full powers, found in good and due form, have agreed as follows:

Article 1

The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being

accused or convicted of any of the crimes or offenses enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

Article 2

For the purposes of the present Treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions overseas other than those enumerated in Article 14, to- [fol. 764] gether with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Northern Island, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

Article 3

Extradition shall be reciprocally granted for the following crimes or offenses:

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.

2. Manslaghter.

3. Administering drugs or using instruments with intent to procure the miscarriage of women.

4. Rape.

5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.

6. Indecent assault if such crime or offense be indictable in the place where the accused or convicted person is apprehended.

7. Kidnapping or false imprisonment.

8. Child stealing, including abandoning, exposing or unlawfully detaining.

9. Abduction.

10. Procuration; that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person provided that such crime or offense is punishable by imprisonment for at least one year or by more severe punishment.

11. Bigamy.

12. Maliciously wounding or inflicting grievous bodily harm.

13. Threats, by letter or otherwise, with intent to extort money or other things of value.

14. Perjury, or subornation of perjury.

15. Arson.

16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.

17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.

18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.

[fol. 765] 19. (a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.

(b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.

20. Forgery, or uttering what is forged.

21. Crimes or offenses against bankruptcy law.

22. Bribery, defined to be the offering, giving or receiving of bribes.

23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.

24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.

25. Malicious injury to property, if such crime or offence be indictable.

26. (a) Piracy by the law of nations.

(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties.

Article 4

The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

Article 5

The extradition shall not take place, if subsequently to the commission of the crime or offence or the institution

of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

Article 6

A fugitive criminal shall not be surrendered if the crime [fol. 766] or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

Article 7

A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

Article 8

The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

Article 9

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person

convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could at the time of such conviction, have been granted by the High Contracting Party applied to.

Article 10

If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the power whose claim is earliest in date, unless such claim is waived.

Article 11

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

[fol. 767] Article 12

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offence shall be given up when the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

Article 13

All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

Article 14

His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named; that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk

Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed: From the date when such notice comes into effect the territory of the Dominion concerned or of India shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty has acceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

Article 15

The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Gov- [fol. 768] ernor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory: provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the "United Kingdom of Great Britain and Northern Ireland.

Article 16

This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Nigeria Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Protectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate and the Tanganyika Territory.

Article 17

If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorate other than those mentioned in the preceding Article or to any British-protected State, or to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 1r and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

Article 18

The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by

the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and of the [fol. 769] supplementary Convention of the 12th April, 1905, relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other treaty arrangements.

In faith whereof the above-named plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London this twenty-second day of December, 1931.

Charles G. Dawes (Seal), John Simon (Seal).

And whereas, the said treaty has been duly ratified on both parts, and the ratifications of the two Governments were exchanged at London on the fourth day of August, one thousand nine hundred and thirty-two:

Now, therefore, be it known that I, Herbert Hoover, President of the United States of America, have caused the said treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the city of Washington this ni-th day of August in the year of our Lord one thousand nine hundred and thirty-two, and of the Independence of the United States of America the one hundred and fifty-seventh.

Herbert Hoover.

By the President:

Henry L. Stimson, Secretary of State. (Seal.)

[fol. 770] Notes Exchanged Concerning the Extension to Palestine and Trans-Jordan of the Extradition Treaty Between the United States of America and Great Britain

The British Secretary of State for Foreign Affairs (Simon) to the American Ambassador (Dawes)

No. T 15523/46/374

Foreign Office, S. W. 1, 22nd December, 1931.

Your Excellency: With reference to Article 17 of the Extradition Treaty between His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas and the President of the United States of America, signed this day at London, I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom desire that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Palestine (excluding Trans-jordan).

2. I have accordingly the honour to enquire whether the United States Government agree with this proposal. In this event the present note and Your Excellency's reply to that effect will be regarded as placing on record the agreement arrived at in the matter.

I have the honour to be, with the highest consideration. Your Excellency's obedient Servant,

John Simon.

His Excellency General Charles G. Dawes, C. B., etc., etc., etc.

The American Ambassador (Dawes) to the British Secretary of State for Foreign Affairs (Simon)

No. 1582

Embassy of the United States of America

London, December 22, 1931.

SIR: With reference to Article 17 of the Extradition Treaty between the President of the United States of America and His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, signed this day at London, I have the honor to inform you that the Government of the United States of America is agreeable to the proposal of His Majesty's Government in the United Kingdom that the provisions of the above mentioned Treaty shall, as from the date of its entry into [fol. 771] force, be applicable to Palestine (excluding Transjordan).

I have the honor to be, with the highest consideration, Sir, your most obedient, humble Servant.

Charles G. Dawes.

The Right Honble. Sir John Simon, G. C. S. I., etc., etc., etc., Foreign Office, S. W. 1.

The British Secretary of State for Foreign Affairs (Simon) to the American Ambassador (Dawes)

No. T 15523/46/374

Foreign Office, S. W. 1, 22nd December, 1931.

YOUR EXCELLENCY: With reference to Article 17 of the Extradition Treaty between His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas and the President of the United States of America, signed this day at London, I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom desire that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Transjordan.

2. I have accordingly the honour to enquire whether the United States Government agree with this proposal. In this event the present note and Your Excellency's reply to

that effect will be regarded as placing on record the agreement arrived at in the matter.

I have the honour to be, with the highest consideration, Your Excellency's obedient Servant,

John Simon.

His Excellency General Charles G. Dawes, C. B., etc., etc., etc.

The American Ambassador (Dawes) to the British Secretary of State for Foreign Affairs (Simon)

No. 1583

Embassy of the United States of America

London, December 22, 1931.

SIR: With reference to Article 17, of the Extradition Treaty between the President of the United States of America and His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, signed this day at London, I have the honor to inform you that the Government of the United States of America is agreeable to the proposal of His Majesty's Government in the United [fol. 772] Kingdom that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Transjordan.

I have the honor to be, with the highest consideration, Sir, your most obedient, humble servant,

Charles G. Dawes.

The Right Honble. St. John Simon, G. C. S. I., etc., etc., etc., Foreign Office, S. W. 1.

[fol. 772½] [File endorsement omitted.]

[fol. 773] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER GRANTING LEAVE TO FILE MOTION TO VACATE—Dec. 21, 1932

Now this day come the parties by their counsel and counsel for appellee presents a motion for leave to file

instanter a motion to vacate and set aside all orders and opinions of this court, entered and filed herein October 15, 1932, and thereafter, and to dismiss the appeal herein, and the court having heard the oral arguments by Mr. G. Gale Gilbert, counsel for appellee, in support of said motion, and Mr. Franklin R. Overmyer, counsel for appellants, in opposition thereto, It is now here ordered that the said motion for leave to file be, and the same is hereby granted.

It is further ordered that counsel for appellee may file a brief in support of the said motion to set aside certain proceedings, and to dismiss this appeal, by January 3, 1933; and that counsel for appellant may file a brief in opposition thereto within ten days thereafter.

[fol. 774] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Title omitted]

PROOF OF SERVICE—Filed Jan. 4, 1933

UNITED STATES OF AMERICA,
Northern District of Illinois,
Cook County, ss:

Otto F. Seifert, being first duly sworn, deposes and says that he is of lawful age and that on the 3rd day of January, 1933, he personally served the brief and argument in support of appellee's motion to vacate and set aside certain orders and opinions entered herein by delivering to and leaving with the office of Franklin R. Overmyer, their counsel, in the County of Cook in the said district, four copies of said brief and argument.

Otto F. Seifert.

Subscribed and sworn to before me this 3rd day of January, 1933. L. E. Bowen, Notary Public. (Seal.)

[fol. 775] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER EXTENDING TIME—Jan. 13. 1933

On application of counsel for appellee, it is ordered that the time for filing brief for appellee on the motion to dismiss this appeal, etc., be, and the same is hereby extended to and including January 18, 1933; appellants' brief in reply to be filed within two days thereafter.

[fol. 776] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ANSWER OF APPELLANTS TO THE MOTION OF APPELLEE OF DECEMBER 21ST, 1932—Filed Jan. 18, 1933

And now comes the appellants, H. C. W. Laubenheimer, United States Marshal, and Godfrey Haggard, His Britannic Majesty's Consul General, by Franklin R. Overmyer, Adelor J. Petit, Jr., and Wendell H. Ney, their attorneys, and, in answer to the motion made by appellee on December 21, 1932, to vacate all orders and opinions of this Court, say:

1. Appellants deny that on August 19, 1932, all extradition treaties between the United States and Great Britain, theretofore existing, ceased to have any force or effect and a new and different extradition treaty between the nations became operative, but aver that on the contrary the treaties of 1842 and its supplements under which the extradition proceeding was conducted are still in force and effect and that no new treaty is in force and effect as alleged in paragraph 1 of appellee's motion.

2. Appellants admit that the complaint of the appellant Godfrey Haggard, British Consul General, was made before United States Commissioner Edwin K. Walker under and by virtue of the Treaties of 1842 and the supplemental treaties between the United States and Great Britain, and admits that the commissioner's mittimus was based upon [fol. 777] said complaint, and admits that it was from said mittimus that the appellee was discharged; but appellants

aver that the extradition proceedings were and are taken pursuant to such treaties and the statutes of the United States enacted to give said treaties effect, and that the commitment of the commissioner was made pursuant to such treaties and the statutes of the United States enacted to give said treaties effect, and that the commitment of the commissioner was made pursuant to such treaties and such statutes.

3. Appellants admit the allegations of Paragraph 5 of appellee's motion.

4. Appellants admit that on December 22, 1931, an extradition treaty was signed at London as alleged in Paragraph 7 of appellee's motion and admit that it contains Article 18, a part of which is set out in such motion.

5. Appellants deny that the mittimus became a nullity on August 19, 1932, by reason of the fact that the treaty of 1842 and its supplements became without force by virtue of the provisions of the treaty signed December 22, 1931, but on the contrary, appellants aver that said last mentioned treaty provides in part:

"The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties."

Appellants aver that in and by the laws of Great Britain before such treaty can come into force and effect, it is necessary that the Privy Council of Great Britain shall enter an appropriate order, which order has not as yet been entered, and that the United States and Great Britain agree that the said treaty is not in force until such time, as shown by the documents attached hereto and made a part hereof.

6. Appellants deny that the so-called extradition treaty of 1932 does not enumerate the crime here charged, namely, receiving money knowing it to have been fraudulently ob- [fol. 778] tained, but on the contrary aver that said crime is embraced in the crime of receiving money knowing it to have been stolen or unlawfully obtained, which is enumerated in the said treaty of 1932. Appellants deny that the alleged treaty of 1932 is the only existing treaty and that the mittimus issued to detain the appellee is void, but on the contrary aver that not only is said treaty not in force,

but assuming it were, there is no provision therein making it retroactive; there is no intention expressed or implied to affect pending proceedings; and such is not the legal effect of the revision and re-enactment of the provisions of the treaty of 1842 and its supplements in the treaty of 1932.

7. Appellants deny that the mittimus issued herein ceased to have any force and effect as alleged in Paragraph 10 of appellee's motion, and deny that this court ceased to have jurisdiction of the appeal and deny that the treaty of 1842 and its supplements were not in existence on October 15, 1932, when this court rendered its decision.

8. Appellants aver that the United States on November 7, 1932, surrendered Harry Geen, a confederate of Factor, who was charged under the treaty of 1842 and its supplements, and the applicable federal statutes.

Appellants reserve the right to make such other and further answer or demurrer as may be necessary in the premises.

Godfrey Haggard, British Consul General; H. C. W. Laubenheimer, United States Marshal, Appellants, by Franklin R. Overmyer, Adelor J. Petit, Jr., Wendell H. Ney, Their Attorneys.

[fol. 779] *Duly sworn to by Franklin R. Overmyer. Jurat omitted in printing.*

[fol. 780] His Majesty's Consul General at Chicago, presents his compliments to Franklin R. Overmyer, Esq., Chicago and has the honour to transmit to him the undermentioned documents.

British Consulate General, 360 N. Michigan Avenue, Chicago, Illinois.

7th January, 1933.

Reference to previous correspondence.

Description of enclosure:

Name and date: From H. M. Consul General, Philadelphia, dated December 31st, 1932.

Subject: Extradition of Harry Geen.

Copy

Department of State

To all to whom these presents shall come, Greetings:

Whereas, Mr. F. D. G. Osborne, C. M. G., Charge d'Affaires ad interim of Great Britain (October 29, 1932), accredited to this Government, has made requisition in conformity with the provisions of existing treaty stipulations between the United States of America and Great Britain for the mutual delivery of criminals, fugitives from justice in certain cases, for the delivery up of Harry Geen, alias Harry Green, charged with the crime of receiving money knowing same to have been fraudulently obtained, committed within the jurisdiction of the British Government;

And Whereas, the said Harry Geen, alias Harry Green, has been found within the jurisdiction of the United States and has by proper authority and due form of law, been brought before Oliver B. Dickinson, Judge of the United States District Court for the Eastern District of Pennsylvania, for examination upon said charge of receiving money knowing the same to have been fraudulently obtained;

And Whereas, the said Judge has found and adjudged that the evidence produced against the said Harry Geen, alias Harry Green, is sufficient in law to justify his commitment upon the said charge, and has, therefore, ordered that the said Harry Geen, alias Harry Green, be committed [fol. 781] pursuant to the provisions of said treaty stipulations.

Now, Therefore, Pursuant to the provisions of Section 5272 of the Revised Statutes of the United States, These Presents are to require the United States Marshall for the Eastern District of Pennsylvania, or any other public officer or person having charge or custody of the aforesaid Harry Geen, alias Harry Green, to surrender and deliver him up to such person or persons as may be duly authorized by the Government of Great Britain to receive the said Harry Geen, alias Harry Green, to be tried for the crime of which he is so accused.

In Testimony Whereof, I have hereunto signed my name and caused the Seal of the Department of State to be affixed.

Done at the City of Washington, this 7th day of November, A. D. 1932, and of the Independence of the United States of America the 157th.

(Signed) W. R. Castle, Acting Secretary of State.
(Seal.)

Department of State, United States of America.

Endorsement

To the United States Marshal for the Eastern District of Pennsylvania:

You are hereby requested to hand over the person of Harry Geen, alias Harry Green, to Detective Inspector George Philpott of the London City Police.

Given at the British Consulate General, Philadelphia, this twenty-fifth day of November, One thousand nine hundred and thirty-two.

(Signed) Frederick Watson, H. B. M. Consul General.

[fol. 782] Department of State, Washington

October 11, 1932.

In reply refer to Le 211.41/170.

Messrs. Murray, Hollaman & Lockwood, 29 Broadway, New York, New York.

Sirs: The Department has received your letter of October 6, 1932, in which you ask whether the treaty of extradition between the United States and Great Britain, signed December 22, 1931, has yet come into force.

The Department's information indicates that before this treaty shall enter into force the British Government must issue an Order of Council bearing thereon. The American Embassy at London has been directed to inform the Department by telegraph when such an Order shall have been issued, but the Department has not yet been advised of its issuance.

Very truly yours, for the Secretary of State: (Signed) Green H. Hackworth, Green H. Hackworth, Legal Adviser.

[fol. 783] No. 28-1

His Majesty's Consul General at Chicago presents his compliments to Mr. Franklin R. Overmyer, Chicago, and has the honour to transmit to him the under-mentioned documents.

British Consulate General, 360 N. Michigan Avenue, Chicago, Illinois.

4th January, 1933.

Reference to previous correspondence:
Mr. Bernays' letter dated 3rd January, 1933.

Description of enclosure:
Name and date: Copy of letter dated December 30, 1932, from Acting Secretary of State to H. B. M. Ambassador.
Subject: Factor extradition case.

Copy

"December 30, 1932.

My Dear Mr. Ambassador: I have received your note of December 23, 1932, in which you state that you are informed that the attorneys for John Jacob Factor in the matter of the application for his extradition to Great Britain have applied to the Circuit Court of Appeals in the city of Chicago, Illinois, for leave to file a motion to dismiss the extradition proceedings on the ground that the new extradition treaty between the United States and Great Britain has nullified the effect of all pre-existing extradition treaties between the two countries. You add that you understand that the Court has granted the leave requested but has advised Factor's attorneys to obtain from me a ruling as to the appropriate interpretation of the provisions of [fol. 784] Article 18 of the new treaty with respect to cases pending when the treaty entered into force.

No such ruling has been asked of me. Moreover, it may be said that so far as I am informed the extradition treaty signed December 22, 1931, has not yet come into force as between the United States and Great Britain although it was proclaimed by the President of the United States on August 9, 1932, following the exchange of ratifications. The American Embassy at London informed this Department on August 19, 1932, of the receipt of a note from the British

Foreign Office stating that steps were being taken for the issue of an Order in Council applying the Extradition Acts in respect of the United States and that the Embassy would be informed in due course of the date of publication of such an Order "and of the coming into force of the Treaty." In reply to this despatch from the Embassy it was directed to telegraph the Department upon the receipt by it of information from the Foreign Office relative to the coming into force of the treaty. No such information has come from the Embassy and the Department has recently been advised by the American Consulate General in London that after consultation with the Embassy it had been learned that the treaty had not yet been put into force.

I am, my dear Sir Ronald, very sincerely yours,

(Sgd.) W. R. Castle, Jr., Acting Secretary."

[fol. 785] His Excellency the Hon. Sir Ronald Lindsay, P. C., G. C. M. G., K. C. B., C. V. O., British Ambassador.

British Embassy, Washington, D. C.

January 11, 1933.

SIR: I have to inform you that I consulted His Majesty's Government in the United Kingdom regarding the question whether or not the Extradition Treaty between Great Britain and the United States, signed on December 22, 1931, can be considered to have entered into force between the two countries.

I am advised that a bilateral treaty which is stated to be intended to provide for the "reciprocal extradition of criminals" cannot be enforced in one signatory State only, and article 18 of the treaty is consistent with this proposition.

The necessary Order in Council to enforce the treaty has not been promulgated in Great Britain.

I am, Sir, your obedient servant, R. C. Lindsay.

Lewis Edward Bernays, Esq., O.B.E., His Majesty's Consul General, Chicago, Illinois.

[fol. 786] British Consulate General, Chicago

3rd January, 1933.

DEAR MR. OVERMYER: Confirming our conversation of Saturday, I wish to record the fact that a telegram from the Foreign Office indicates that the new extradition treaty is not yet in force since the necessary Order in Council has not been made. The message also emphasizes the fact that the expression "Unlawfully obtained" in Article 3 (18) of the new treaty is obviously wider than and includes the former expression "Fraudulently obtained."

A letter from the State Department dated the 30th indicates that the Secretary of State has not been approached by Factor's attorneys for a ruling as to his interpretation of the provisions of Article 18 of the new treaty. However, the Secretary of State likewise points out that the new treaty is not in force in view of the fact that no Order in Council ratifying it has been issued.

Yours very truly, Lewis Bernays, H. M. Consul General.

Franklin R. Overmyer, Esq., 33 S. Clark Street, Chicago.

LB/ERR.

[fol. 787] Western Union

1933, Jan. 9, P.M. 3:57.

Received at 427 So. LaSalle St., Chicago, Ill.
CDY344 Cable—London 17 9.

Nlt Petit Olin and Overmyer, Chgo.:

According to latest information treaty not yet in force.
American Embassy.

Western Union

January 7, 1933.

London Gazette, London, England:

An extradition treaty with United States was signed at London December twenty-second, nineteen thirty-one. Understand same does not come into force until an Order in Council is published in the Gazette. Please send night cable collect whether such an order has been published.

Petit, Olin & Overmyer.

Western Union

1933, Jan. 9, A.M. 6:54.

Received at 427 So. LaSalle St., Chicago, Ill.
CDZ91 Cable—London 10 9/1232P.

LCO Petit Olin and Overmyer, Chgo.:

Order not published.

London Gazette.

[fol. 788] IN UNITED STATES CIRCUIT COURT OF APPEALS

REPLICATION TO ANSWER OF APPELLANTS TO MOTION OF APPELLEE OF DECEMBER 21, 1932—Filed Jan. 21, 1933

Now comes the appellee, John Factor, by Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr., Allan J. Carter and Don M. Peebles, his counsel, and for replication to the answer of appellants to the motion of appellee filed in this cause on December 21, 1932, to vacate orders and opinions and dismiss the appeal, says:

1. That as to the matters and things averred in paragraph 1 of said answer, appellee denies and joins issue on said averments.

2. That as to the matters and things contained in paragraphs 2, 3 and 4 of said answer, there is no conflict between appellants and appellee, except that as to said paragraph 2 appellee denies that any valid extradition proceeding or warrant may be taken, issued or used against him under the provisions of Article X of the Treaty of 1842 and the Convention of 1889 at this time, and joins issue on such averment.

3. That as to the matters and things contained in paragraph 5 of said answer of appellants, appellee admits that the Treaty of 1932 contains the provisions set forth in said paragraph, but denies and joins issue on the averment that by the laws of Great Britain the Treaty can only come into force and effect by an appropriate order of the Privy Council of Great Britain, and denies and joins issue on the allegation that the United States and Great Britain agree that

the said Treaty is not in force until some order is adopted [fol. 789] by the Privy Council of Great Britain, and submits in support of appellee's position on this issue so joined:

(a) Copy of pages 4475, 4476, 4477 and 4478 of the Congressional Record, Volume 75, covering the legislative proceedings of the United States Senate, February 19, 1932, marked Exhibit 1;

(b) A certified copy of the ratification of said Treaty of 1932 by the King of England, marked Exhibit 2;

(c) A certified copy of the protocol attesting the exchange of ratifications of said Treaty, marked Exhibit 3;

(d) A copy of the 1932 Treaty as published by His Majesty's Stationery Office in London in January, 1932, marked Exhibit 4;

(e) A letter dated January 6, 1933, addressed to the Secretary of State of the United States and the reply of the Department of State of the same date, marked Exhibits 5 and 6, respectively;

(f) A certified copy of letter to State Department signed by Ray Atherton, American charge d' affaires ad interim, dated November 9, 1932, stating that he had made inquiry at the British Foreign Office as to the progress of the steps to pass an Order in Council and that he was there advised that the Order had been prepared and submitted to the Home Secretary for his consideration, which said certified copy of letter is now being sent from Washington to attorneys for appellee and will be filed herein promptly upon receipt thereof and will be marked Exhibit 7;

all of which said documents, marked Exhibits 1, 2, 3, 4, 5, and 6, respectively, are attached hereto and made a part hereof by reference. The document which will be marked Exhibit 7 and filed in this cause immediately upon receipt [fol. 790] thereof is also made a part hereof by this reference thereto. The Treaty of 1932 and the Proclamation of the President, which said Treaty and Proclamation were attached to and made a part of the motion of appellee to dismiss this appeal filed in this cause on December 21, 1932, and which were also reprinted as Appendix B to ap-

pellee's original brief in support of said motion, are also hereby made a part hereof by this reference thereto.

4. That as to the matters and things contained in paragraph 6 of said answer, appellee denies and joins issue on said averments.

5. That as to the matters and things set forth in paragraph 7 of said answer, appellee denies and joins issue on said averments.

6. That as to the matters and things contained in paragraph 8 of said answer, appellee denies that Harry Geen was a confederate of appellee in any criminal enterprise whatsoever. Appellee further avers that he is informed and believes that said Harry Geen was surrendered by the United States on November 7, 1932, under the provisions of the Treaty of 1842 and the Convention of 1889, but avers that such surrender was made by the issuance of a President's warrant by the Secretary of State as an ordinary matter of routine without opposition being made thereto on behalf of the said Harry Geen, owing to the fact that neither said Harry Geen nor his counsel had any knowledge whatsoever of the existence of said 1932 Extradition Treaty. Appellee further avers that he is informed and believes that if said Harry Geen and his counsel had known of the existence of said Treaty they would have immediately called it to the attention of the Department of State; would then have contested the issuance of said [fol. 791] warrant and would not have moved to dismiss his appeal in the Circuit Court of Appeals, but would have contested the validity of the mittimus under which he was detained on the grounds that the adoption of the 1932 Treaty rendered the same void. Appellee further avers that he is informed and believes that upon the return of the said Harry Geen to London, an indictment was returned against him which included charges other than those upon which his extradition from the United States was sought by Great Britain, and that it was necessary for the said Geen, through his counsel, to protest this breach of faith upon behalf of Great Britain to the Secretary of State of the United States, who in turn lodged a protest with the British Government resulting in the dismissal of nine out of sixteen counts of the indictment which had been returned against said Geen, which said nine counts were on

charges other than those upon which his extradition was sought, or his surrender granted; and shows in support thereof the affidavit of John R. K. Scott, of Philadelphia, marked Exhibit 8, attached hereto and made a part hereof by reference thereto. Appellee further shows that his attorneys have in their possession a true and correct copy of the indictment returned against said Geen in London on December 5, 1932, consisting of sixteen counts, and that said attorneys stand ready to exhibit the same to this Court should the Court desire to examine the same.

John Factor, Appellee, by Rush C. Butler, S. O. Levinson, G. Gale Gilbert, Jr., Allan J. Carter, Don M. Peebles.

[fol. 792] *Duly sworn to by Allan J. Carter. Jurat omitted in printing.*

[fol. 793] EXHIBIT 1

1932 Congressional Record—Senate 4475

Extradition Treaty with Great Britain

The Chief Clerk proceeded to read Calendar No. 8, Executive E. (72d Cong., 1st sess.), a treaty for the extradition of fugitives from justice, signed by the plenipotentiaries of the United States and His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, at London, on December 22, 1931, and agreements by two exchanges of notes to make the treaty applicable also to Palestine and Transjordan, respectively, which was considered as in Committee of the Whole and is as follows:

To the Senate of the United States:

To the end that I may receive the advice and consent of the Senate to ratification, I transmit herewith a treaty for the extradition of fugitives from justice, signed by the plenipotentiaries of the United States and His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, at London, on December 22, 1931, and agreements by two exchanges of

notes to make the treaty applicable also to Palestine and Transjordan, respectively.

Accompanying the treaty is a report by the Secretary of State, to which the attention of the Senate is invited.

Herbert Hoover.

The White House, February 5, 1932.

[fol. 794] The President:

The undersigned, the Secretary of State, has the honor to lay before the President, with a view to its transmission to the Senate to receive the advice and consent of that body to ratification, if his judgment approve thereof, a treaty signed at London on December 22, 1931, by the plenipotentiaries of the United States of America and His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, for the extradition of persons accused or convicted of any of the crimes or offenses enumerated therein committed within the jurisdiction of the United States or Great Britain, who shall be found within the territory of the other party.

The treaty is open to subsequent adherence on the part of the several self-governing dominions of His Britannic Majesty and India.

As between the United States and the territory of His Britannic Majesty to which the present treaty is made applicable, the provisions of article 10 of the treaty of August 9, 1842, the extradition convention of July 12, 1889, the supplementary extradition convention of December 13, 1900, and the supplementary extradition convention of April 12, 1905, between the two Governments shall cease to have effect on the coming into force of the present treaty. These [fol. 795] conventions, however, remain in force in respect of the self-governing dominions and India until they shall have adhered to the present treaty or entered into other treaty arrangements with the United States concerning extradition.

There are also submitted copies of two exchanges of notes by which it is agreed that on the coming into force of this convention its provisions shall be applicable to Palestine and Transjordan, respectively.

Respectfully submitted.

Henry L. Stimson.

Department of State, Washington, February 4, 1932.

[fol. 796] The President of the United States of America, and His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India; desiring to make more adequate provision for the reciprocal extradition of criminals, have resolved to conclude a treaty for that purpose, and to that end have appointed as their plenipotentiaries:

The President of the United States of America: General Charles G. Dawes, Ambassador Extraordinary and Plenipotentiary of the United States of America at the Court of St. James;

And His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, for Great Britain and Northern Ireland:

The Right Honorable Sir John Simon, G.C.S.I., M.P., His Principal Secretary of State for Foreign Affairs;

who, having communicated their full powers, found in good and due form, have agreed as follows:

Article 1

The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

Article 2

For the purposes of the present Treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions [fol. 797] overseas other than those enumerated in Article 14, together with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

Article 3

Extradition shall be reciprocally granted for the following crimes or offenses:

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.

2. Manslaughter.

3. Administering drugs or using instruments with intent to procure the miscarriage of women.

4. Rape.

5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.

6. Indecent assault if such crime or offense be indictable in the place where the accused or convicted person is apprehended.

7. Kidnapping or false imprisonment.

8. Child stealing, including abandoning, exposing or unlawfully detaining.

9. Abduction.

10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in *in* either case to gratifying the passions of another person provided that such crime or offense is punishable by imprisonment for at least one year or by more severe punishment.

11. Bigamy.

12. Maliciously wounding or inflicting grievous bodily harm.

13. Threats, by letter or otherwise, with intent to extort money or other things of value.

14. Perjury, or subornation of perjury.

15. Arson.

16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.

17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.

18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.

[fol. 798] 19. (a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.

(b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.

20. Forgery, or uttering what is forged.

21. Crimes or offences against bankruptcy law.

22. Bribery, defined to be the offering, giving or receiving of bribes.

23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.

24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.

25. Malicious injury to property, if such crime or offence be indictable.

26. (a) Piracy by the law of nations.

(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such par-

ticipation be punishable by the laws of both High Contracting Parties.

Article 4

The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

Article 5

The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

Article 6

A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

[fol. 799]

Article 7

A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

Article 8

The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

Article 9

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

Article 10

If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date, unless such claim is waived.

Article 11

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

Article 12

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offence shall be given up when the extradition takes place,

[fol. 800] in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

Article 13

All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

Article 14

His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named—that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland—and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice comes into effect the territory of the Dominion concerned or of India shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty has acceded, shall be made by the appropriate diplomatic of consular officer of the United States of America.

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the pres-

ent Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

Article 15

The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory: provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor [fol. 801] or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

Article 16

This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Nigera Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Protectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

Article 17

If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British-protected State, or to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty,

other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

Article 18

The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and of the supplementary Convention of the 12th April, 1905, relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other [fol. 802] treaty arrangements.

In faith whereof the above-named plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London this twenty-second day of December, 1931.

Charles G. Dawes (Seal), John Simon (Seal).

[fol. 803] Exchanges of Notes

No. T 15523/46/374

Foreign Office, S.W. 1, 22nd December, 1931.

Your Excellency: With reference to Article 17 of the Extradition Treaty between His Majesty The King of

Great Britain, Ireland and the British Dominions beyond the Seas and the President of the United States of America, signed this day at London, I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom desire that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Palestine (excluding Transjordan).

2. I have accordingly the honour to enquire whether the United States Government agree with this proposal. In this event the present note and Your Excellency's reply to that effect will be regarded as placing on record the agreement arrived at in the matter.

I have the honour to be, with the highest consideration, Your Excellency's obedient servant.

John Simon.

His Excellency, General Charles G. Dawes, C. B., etc., etc., etc.

Embassy of the United States of America, London

No. 1582

December 22, 1931.

SIR: With reference to Article 17 of the Extradition Treaty between the President of the United States of America and His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, signed this [fol. 804] day at London, I have the honor to inform you that the Government of the United States of America is agreeable to the proposal of His Majesty's Government in the United Kingdom that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Palestine (excluding Transjordan).

I have the honor to be, with the highest consideration, Sir, your most obedient, humble servant,

Charles G. Dawes.

The Right Honble. Sir John Simon, G.C.S.I., etc., etc., etc., Foreign Office, S.W. 1.

Foreign Office, S.W. 1

No. T 15523/46/374

22nd December 1931.

YOUR EXCELLENCY: With reference to Article 17 of the Extradition Treaty between His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas and the President of the United States of America, signed this day at London, I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom desire that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Transjordan.

2. I have accordingly the honour to enquire whether the United States Government agree with this proposal. In this event the present note and Your Excellency's reply to that effect will be regarded as placing on record the agreement arrived at in the matter.

I have the honour to be, with the highest consideration, Your Excellency's obedient Servant,

John Simon.

His Excellency General Charles G. Dawes, C.B., etc. etc., etc.

Embassy of the United States of America, London

No. 1583

December 22, 1931.

SIR: With reference to Article 17 of the Extradition Treaty between the President of the United States of [fol. 805] America and His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, signed this day at London, I have the honor to inform you that the Government of the United States of America is agreeable to the proposal of His Majesty's Government in the United Kingdom that the provisions of the above mentioned Treaty shall, as from the date of its entry into force, be applicable to Transjordan.

I have the honor to be, with the highest consideration, Sir, your most obedient, humble servant,

Charles G. Dawes.

The Right Honble. Sir John Simon, G.C.S.I., etc., etc., etc., Foreign Office, S.W. 1.

[fol. 806] The treaty was reported to the Senate without amendment, and the resolution of ratification was read as follows: Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive E, Seventy-second Congress, first session, an extradition treaty with Great Britain signed at London on December 22, 1931.

The resolution was agreed to, two-thirds of the Senators present voting in the affirmative.

[fol. 807] EXHIBIT 2

No. 39

United States of America, Department of State

To all to whom these presents shall come, Greeting:

I certify that the document hereunto annexed is a true copy from the original in the archives of this Department.

(Ratification by the King of Great Britain of the extradition treaty signed between the United States of America and Great Britain at London, December 22, 1931.)

In testimony whereof I, Henry L. Stimson, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Acting Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this fifth day of January, 1933.

Henry L. Stimson, Secretary of State, by P. F. Allen, Acting Chief Clerk. (Seal of the Department of State, United States of America.)

George, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, &c., &c., &c., to all and singular to whom these presents shall come, Greeting:

Whereas a Treaty between Us, in respect to our United Kingdom of Great Britain and Northern Ireland, and Our Good Friend the President of the United States of America,

regarding the Extradition of Fugitive Criminals, was concluded and signed at London on the Twenty-second day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-one, by the Plenipotentiaries of Us and of Our said Good Friend duly and respectively authorized for that purpose, which Treaty is, word for word, as follows:

[fol. 808] His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, and the President of the United States of America, desiring to make more adequate provision for the reciprocal extradition of criminals, have resolved to conclude a treaty for that purpose, and to that end have appointed as their plenipotentiaries:

His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, for Great Britain and Northern Ireland: The Right Honourable Sir John Simon, G.C.S.I., M.P., His Principal Secretary of State for Foreign Affairs;

And the President of the United States of America: General Charles G. Dawes, Ambassador Extraordinary and Plenipotentiary of the United States of America at the Court of St. James,

who, having communicated their full power, found in good and due form, have agreed as follows:

[fol. 809]

Article 1

The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3 committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

Article 2

For the purposes of the present Treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions [fol. 810] overseas other than those enumerated in Article

14, together with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

Article 3

Extradition shall be reciprocally granted for the following crimes or offences:

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.

2. Manslaughter.

3. Administering drugs or using instruments with intent to procure the miscarriage of women.

4. Rape.

5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.

6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.

7. Kidnapping or false imprisonment.

8. Child stealing, including abandoning, exposing or unlawfully detaining.

9. Abduction.

10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in *in* either case to gratifying the passions of another person provided that such crime or offence is punishable

by imprisonment for at least one year or by more severe punishment.

11. Bigamy.

12. Maliciously wounding or inflicting grevious bodily harm.

13. Threats, by letter or otherwise, with intent to extort money or other things of value.

14. Perjury, or subornation of perjury.

15. Arson.

16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.

17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.

18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.

[fol. 811] 19. (a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.

(b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.

20. Forgery, or uttering what is forged.

21. Crimes or offences against bankruptcy law.

22. Bribery, defined to be the offering, giving or receiving of bribes.

23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.

24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.

25. Malicious injury to property, if such crime or offence be indictable.

26. (a) Piracy by the law of nations.

(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties.

Article 4

The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

Article 5

The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

Article 6

A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

[fol. 812]

Article 7

A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

Article 8

The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

Article 9

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

Article 10

If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date, unless such claim is waived.

Article 11

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

Article 12

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime [fol. 813] or offence shall be given up when the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

Article 13

All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

Article 14

His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named—that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland—and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice comes into effect the territory of the Dominion concerned or of India shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty

has acceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

Article 15

The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory: provided, nevertheless, that if an order for the committal of the fugitive criminal to [fol. 814] prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

Article 16

This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate,

Nigeria Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Protectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

Article 17

If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British-protected State, or to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

Article 18

The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and of the supplementary Convention of the 12th April, 1905, rela-

tive to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty [fol. 815] in accordance with Article 14 or until replaced by other treaty arrangements.

In faith whereof the above-named plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London this twenty-second day of December, 1931.

(L. S.) John Simon, (L. S.) Charles G. Dawes.

We, having seen and considered the Treaty aforesaid, have approved, accepted, and confirmed the same in all and every one of its Articles and Clauses, as We do by these Presents approve, accept, confirm, and ratify it; in respect of Our United Kingdom of Great Britain and Northern Ireland, for Ourselves, Our Heirs and Successors; engaging and promising upon Our Royal Word that We will sincerely and faithfully perform and observe all and singular the things which are contained and expressed in the Treaty aforesaid, and that We will never suffer the same to be violated by any one, or transgressed in any manner, as far as it lies in Our power. For the greater testimony and validity of all which, We have caused Our Great Seal to be affixed to these Presents, which We have signed with our Royal Hand.

Given at Our Court of St. James, the Twenty-ninth day of July, in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and in the Twenty-third year of Our Reign.

George, R. I. (Seal.)

[fol. 816] EXHIBIT 3

No. 40

United States of America, Department of State

To all to whom these presents shall come, Greeting:

I certify that the document hereunto annexed is a true copy from the original in the archives of this Department.

(Protocol attesting the exchange of ratifications of the

extradition treaty signed between the United States of America and Great Britain at London, December 22, 1931.)

In testimony whereof I, Henry L. Stimson, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Acting Chief Clerk of the said Department, at the City of Washington, in the District of Columbia, this fifth day of January, 1933.

Henry L. Stimson, Secretary of State, by P. F. Allen, Acting Chief Clerk. (Seal of the Department of State, United States of America.)

The undersigned having met together for the purpose of exchanging the Ratifications of a Treaty between the President of the United States of America and His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, in respect of the United Kingdom of Great Britain and Northern Ireland, regarding the reciprocal extradition of fugitive criminals, signed at London on the 22nd day of December, 1931; and the respective Ratifications of the said Treaty having been carefully compared, and found to be exactly conformable to each other, the said exchange took place this day in the usual form.

In witness whereof they have signed the present Certificate, and have affixed thereto their seals.

Done at London, the 4th day of August, 1932.

Ray Atherton (Seal), John Simon (Seal).

[fol. 817] EXHIBIT 4

[British Coat-of-Arms]

United States No. 1 (1932)

Extradition Treaty Between His Majesty, in Respect of the United Kingdom, and the President of the United States of America

London, December 22, 1931

[This Treaty has not been ratified by His Majesty]

Presented by the Secretary of State for Foreign Affairs to Parliament by Command of His Majesty

London:

Printed and Published by His Majesty's Stationery Office

To be purchased directly from H.M. Stationery Office at the following addresses: Adastral House, Kingsway, London, W.C.2; 120, George Street, Edinburgh; York Street, Manchester; 1 St. Andrew's Crescent, Cardiff; 15, Donegall Square West, Belfast; or through any Bookseller.

1932

Price 2d. Net

Cmd. 3999.

[fol. 818] Extradition Treaty Between His Majesty, in Respect of the United Kingdom, and the President of the United States of America

London, December 22, 1931

His Majesty, the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, and the President of the United States of America, desiring to make more adequate provision for the reciprocal extradition of criminals, have resolved to conclude a Treaty for that purpose, and to that end have appointed as their plenipotentiaries:

His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, for Great Britain and Northern Ireland: The Right Honourable Sir John Simon, G.C.S.I., M.P., His Principal Secretary of State for Foreign Affairs;

And the President of the United States of America: General Charles G. Dawes, Ambassador Extraordinary and Plenipotentiary of the United States of America at the Court of St. James,

who, having communicated their full powers, found in good and due form, have agreed as follows:

Article 1

The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

[fol. 819]

Article 2

For the purposes of the present treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions overseas other than those enumerated in Article 14, together with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

Article 3

Extradition shall be reciprocally granted for the following crimes or offences:

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.

2. Manslaughter.

3. Administering drugs or using instruments with intent to procure the miscarriage of women.

4. Rape.

5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a gird under 16 years of age.

6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.

7. Kidnapping or false imprisonment.

8. Child stealing, including abandoning, exposing or unlawfully detaining.

9. Abduction.

10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in *in* either case to gratifying the passions of another person provided that such crime or offence is punishable by imprisonment for at least one year or by more severe punishment.

11. Bigamy.

12. Maliciously wounding or inflicting grievous bodily harm.

13. Threats, by letter or otherwise, with intent to extort money or other things of value.

14. Perjury, or subornation of perjury.

[fol. 820] 15. Arson.

16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.

17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.

18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to be have been stolen or unlawfully obtained.

19. (a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.

(b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.

20. Forgery, or uttering what is forged.

21. Crimes or offences against bankruptcy law.

22. Bribery, defined to be the offering, giving or receiving of bribes.

23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.

24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.

25. Malicious injury to property, if such crime or offence be indictable.

26. (a) Piracy by the law of nations.

(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties.

Article 4

The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the

trial and the full execution of any punishment awarded to him.

[fol. 821]

Article 5

The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

Article 6

A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

Article 7

A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

Article 8

The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Brittanic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

Article 9

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

[fol. 822]

Article 10

If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date, unless such claim is waived.

Article 11

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

Article 12

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offense shall be given up when the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

Article 13

All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

Article 14

His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereinafter named—that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland—and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice comes into effect the territory of the Dominion concerned or of India shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty has acceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

[fol. 823] Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

Article 15

The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic

Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory: provided, nevertheless, that if an order for the committal of the fugitive criminal to prison to await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

Article 16

This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Nigeria Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Protectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

Article 17

If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British-protected State, or to any terri- [fol. 824] tory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

Article 18

The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and of the supplementary Convention of the 12th April, 1905, relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other treaty arrangements.

In faith whereof the above-named plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London this twenty-second day of December, 1931.

John Simon, Charles G. Dawes.

6156 Wt.—750 1/32 F. O. P. 6400 Gp. 340.

[fol. 825] EXHIBIT 5

Washington, D. C., January 6, 1933.

The Honorable the Secretary of State.

SIR: The Circuit Court of Appeals for the Seventh District has requested me to ascertain from you whether your Department has formally ruled upon any case or occasion

that the Extradition Treaty between the United States and Great Britain, which was proclaimed by the President of the United States on August 9, 1932, is or is not in effect.

Calling your attention to a letter dated December 30, 1932, signed by William R. Castle, Jr. as Acting Secretary of State, to the British Ambassador concerning this particular treaty, may I ask upon what evidence of law and fact in your Department such letter was predicated.

Respectfully yours, Salmon O. Levinson.

[fol. 826] EXHIBIT 6

Department of State, Washington

Address official communications to the Secretary of State, Washington, D. C.

In reply refer to Le.

January 6, 1933.

Mr. S. O. Levinson, Washington, D. C.

SIR: I am in receipt of your letter of January 6, 1933, in which you state that the Circuit Court of Appeals for the Seventh Circuit has requested you to ascertain from the Secretary of State whether this Department has formally ruled "upon any case or occasion" that the Extradition Treaty between the United States and Great Britain which was proclaimed by the President on August 9, 1932 is or is not in effect. You also call attention to a communication dated December 30, 1932, addressed by the Acting Secretary of State, Mr. Castle, to the British Ambassador regarding this treaty and inquire upon what evidence of law and fact in this Department such letter was predicated.

With respect to the first inquiry you are informed that the Department has had no case before it and no occasion has arisen requiring it to pass upon the question whether the Treaty is or is not in effect.

As to the second inquiry you are informed that the communication of December 30, 1932, addressed to the British Ambassador was based on a note received by the American [fol. 827] Embassy at London from the British Foreign Office under date of August 18, 1932, a copy of which, to-

gether with the Embassy's communication to which the note of the Foreign Office was a reply is hereto attached; also on information contained in a despatch addressed to the Department by the American Consul General at London, dated November 12, 1932, stating that the steps referred to in the note of August 18, 1932, from the British Foreign Office had not yet been taken.

Very truly yours, for the Secretary of State: James Grafton Rogers, Assistant Secretary.

Enclosures: Copy of note from British Foreign Office of August 18, 1932, and copy of Embassy's note to the Foreign Office of August 12, 1932.

American Embassy, London

No. 196

August 12, 1932.

SIR: I have the honor to refer to the note No. T 11027/46/374 of September 14, 1931 from the Foreign Office and other correspondence, relative to the Extradition Treaty between the United Kingdom and the United States, and in compliance with instructions which I have received from my Government, to inform you that the Treaty in question which was signed on December 22, 1931, at London, was [fol. 828] proclaimed by the President of the United States on August 9, 1932.

I have the honor to be, with the highest consideration, Sir, your most obedient, humble servant,

Ray Atherton, Charge d'Affaires ad Interim.

The Right Honorable Sir John Simon, G. C. S. I., &c., &c., &c., Foreign Office, London S. W. 1.

Foreign Office, S. W. 1

No. T. 9443/852/374

18th August, 1932.

SIR: With reference to your note No. 196 of the 12th instant relative to the proclamation of the Anglo-United States Extradition Treaty by the President of the United States, I have the honour to inform you that the law of

this country requires that where an extradition treaty has been concluded with a foreign country the Extradition Acts should be applied in respect of that country by Order in Council.

2. Steps are being taken for the issue of an Order in Council applying the Extradition Acts in respect of the [fol. 829] United States, and I shall inform you in due course of the date of the publication of the Order in Council and of the coming into force of the Treaty.

I have the honor to be, with high consideration, Sir, your obedient Servant,

(For the Secretary of State:) (Sd.) Charles Dodd.

Ray Atherton, Esq., &c., &c., &c.

[fol. 830] EXHIBIT 8

CITY AND COUNTY OF PHILADELPHIA, SS:

John R. K. Scott, being duly sworn according to law, deposes and says:

That he and William T. Connor, Esquire, acted as counsel for Harry Geen in certain extradition proceedings looking to the removal of the said Harry Geen from the United States of America, which were instituted in the District Court of the United States for the Eastern District of Pennsylvania and subsequently appealed to the United States Circuit Court of Appeals for the Third Circuit, as of March Term, 1932, No. 4869.

Deponent avers that while the appeal was pending in the United States Circuit Court of Appeals for the Third Circuit as above referred to, a petition was presented on behalf of the appellant, Harry Geen, for leave to discontinue and withdraw the appeal then pending.

That the petition was granted and the appellant withdrew his appeal from the said court.

At the time of the withdrawal of the appeal in said proceeding the deponent conferred with the legal Adviser of the Department of State of the United States at Washington, D. C., and at the time of the withdrawal of said appeal neither the deponent nor his associate William T. Connor nor the defendant, Harry Geen had any knowledge

of the existence of a Treaty entered into between the United States of America and Great Britain, which was ratified by the President of the United States on March 3, 1932, by Great Britain on July 29, 1932, and proclaimed by the President of the United States on August 9, 1932.

[fol. 831] Deponent avers that withdrawal of the appeal in the proceeding herein referred to was predicated on the fact and belief that the appellant in said proceedings, Harry Geen, will be tried upon the charges set forth in the petition for extradition filed in the proceeding herein referred to and upon none other, in accordance with the provisions of international law and customs.

That subsequently upon learning that additional charges other than those set forth in the petition for extradition had been found against the appellant, Geen, and that it was the intention of the British Government to try him upon same, a representation was made to the Secretary of State of the United States, through the legal Adviser of the Department of State, that it was the intention of Great Britain to try the appellant upon nine additional charges than those contained in the petition for extradition and the Secretary of State was requested to lodge a protest against a trial upon such additional nine charges.

Deponent avers that advices have been received that upon a protest being entered by the Secretary of State of the United States with the British Government, the nine additional charges herein referred to, other than those set forth in the petition for extradition, have been abandoned and it is not the intention to prosecute the appellant Geen thereon.

John R. K. Scott.

Sworn to and subscribed before me this 19th day of January, A. D. 1933. My commission expires March 26, 1935. Adolph T. Kohn, Notary Public. (Notarial Seal.)

[fol. 832] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4764

[Titled omitted]

PROOF OF SERVICE—Filed Jan. 21, 1933

UNITED STATES OF AMERICA,
Northern District of Illinois,
Cook County, ss:

Ferris E. Hurd, being first duly sworn deposes and says that on the 21st day of January, 1933, he personally served the replication and reply brief and argument of appellee on motion to dismiss appeal filed December 21, 1932, on appellants by delivering to and leaving with the office of Franklin R. Overmyer, their counsel, in the County of Cook in the said District, five copies of said replication and reply brief and argument.

Ferris E. Hurd.

Subscribed and sworn to before me this 21st day of January, 1933. Lee Bowen, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 833] And afterwards, to-wit on the twenty-fifth of January, 1933, there was filed in the office of the Clerk of this Court Exhibit 7 to Replication to Answer, which said Exhibit 7 to Replication is in the words and figures following, to-wit:

EXHIBIT 7

Alschuler, C. J.; Evans, C. J.; Sparks, C. J.

Address official communications to the Secretary of State, Washington, D. C.

In reply refer to Le, 211.41/183.

Department of State, Washington

[SEAL.]

January 21, 1933.

Mr. Raymond Benjamin, 500 Shoreham Building, Washington, D. C.

SIR: Referring to your call at this Department on January 19, 1933, when you discussed with the Legal Adviser the matter of the Extradition Treaty concluded between the United States and Great Britain on December 22, 1931, I enclose for your information a copy of despatch No. 597, dated December 31, 1932, from the American Chargé d'Affaires ad interim at Londan, England, in regard to the matter.

Very truly yours, for the Secretary of State: (Signed). James Grafton Rogers, Assistant Secretary.

Enclosure: Copy of despatch No. 597 of December 31, 1932, as indicated above.

[fol. 834] Copy. FGS

Embassy of the United States of America, London

[SEAL]

No. 597. File No. 211.41/183

December 31, 1932.

Subject: Extradition Treaty with Great Britain, Signed at London December 22, 1931

The Honorable the Secretary of State, Washington, D. C.

SIR: I have the honor to refer to the Embassy's cablegram No. 350 of December 31, 1932, 12 noon, which was based upon an informal inquiry at the Foreign Office this morning, when it was also learned that the publication of the treaty which is necessary to put it into force might be expected in the near future. In this connection, I have the honor to report that in view of the Department's Instruction No. 186 of September 2, 1932, File No. 211.41/167, the

Embassy has several times enquired of the Foreign Office regarding the status of this matter and on November 9 last was informally advised that the necessary Order-in-Council had been drafted and prepared and was then being considered by the Home Office. It was added that when approved by the latter it would then come before the next [fol. 835] meeting of the Privy Council and would take effect ten days after the Privy Council gave its approval. The Foreign Office does not appear to be in a position to say when the next meeting of the Privy Council will be but has promised to inform the Embassy as soon as the Privy Council takes action, so that the Embassy can notify the Department by cable in advance of the date when the treaty will become effective.

Respectfully yours, (Signed) Ray Atherton, Chargé D'Affaires ad Interim.

[fol. 836] IN UNITED STATES CIRCUIT COURT OF APPEALS

4764

H. C. W. LAUBENHEIMER, United States Marshal, and Godfrey Haggard, His Britannic Majesty's Consul General,

vs.

JOHN FACTOR

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

ORDER DENYING MOTION TO VACATE—Jan. 26, 1933

In the matter of the motion of appellee, filed December 12, 1932, to vacate and set aside certain orders and the opinion heretofore entered in the cause, and to dismiss the appeal, for the assigned reason that the Webster-Ashburton Treaty of 1842 and the Blaine-Pauncefote Treaty of 1889, whereunder the extradition proceedings herein were commenced, had been repealed by the Dawes-Simon Treaty of 1932:

[fol. 837] This matter coming on to be heard upon the said motion and the answer thereto, and the exhibits and

letters presented and filed on behalf of the respective parties, and the briefs of counsel; and the Court being fully advised in the premises doth find; That it does not definitely appear, from the evidence submitted, whether or not the Dawes-Simon Treaty of 1932 has become effective in Great Britain, and therefore whether it is effective in the United States; but assuming, though not deciding, that the Dawes-Simon Treaty of 1932 has heretofore become effective and is binding upon the parties thereto, the said Dawes-Simon Treaty of 1932 embodies and carried forward all of the provisions of the other named treaties whereunder the extradition proceedings herein were commenced and carried on, and which this Court held sufficient to warrant the order which was made by the United States Commissioner for the holding of appellee thereunder, and that this proceeding for extradition so begun was not vacated or terminated by reason of the adoption of the Dawes-Simon Treaty.

It is therefore ordered that the said motion of the petitioner be, and the same is hereby, denied.

Appellee excepts, exception allowed.

[fol. 838] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 20, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is advanced and assigned for argument on Monday, April 17th next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.